(14)

No. 03-95 Status: ARGUED
Title: Pennsylvania State Police, Petitioner
v.
Nancy Drew Suders
Docketed: July 17, 2003
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (01-3512)
Decision Date: April 16, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 14 2003	Petition for writ of certiorari filed. (Response due August 18, 2003)
Aug 18 2003	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States.
Sep 3 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 12 2003	Response Requested . (Due October 14, 2003)
Oct 14 2003	Brief of respondent Nancy Drew Suders in opposition filed.
Oct 29 2003	DISTRIBUTED for Conference of November 14, 2003.
Nov 21 2003	DISTRIBUTED for Conference of November 26, 2003.
Dec 1 2003	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States GRANTED.
Dec 1 2003	Petition GRANTED.
Dec 24 2003	Blanket consent to the filing of amici briefs in support of either party received from counsel for the petitioner and counsel for the respondent.
Jan 12 2004	SET FOR ARGUMENT WEDNESDAY, MARCH 31, 2004.
Jan 12 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including January 20, 2004.
Jan 20 2004	Brief amicus curiae of United States filed.
Jan 20 2004	Brief amicus curiae of Society for Human Resource Management filed.
Jan 20 2004	Brief amicus curiae of Equal Employment Advisory Council filed.
Jan 20 2004	Brief amicus curiae of Chamber of Commerce of the United States filed.
Jan 20 2004	Joint appendix filed.
Jan 20 2004	Brief of petitioner Pennsylvania State Police filed.
Jan 30 2004	CIRCULATED.
Feb 3 2004	Record received from the U.S.C.A. for the 3rd Circuit. (1 envelope)
Feb 6 2004	Record received from the U.S.D.C. for the Middle District of Pennsylvania. (1 envelope)
Feb 24 2004	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Mar 1 2004	Brief of respondent Nancy Drew Suders filed. (Distributed)
Mar 1 2004	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Mar 5 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 11 2004	Motion for leave to allow Lawyers' Committee for Civil Rights Under Law to participate in oral argument as amicus curiae and for divided argument filed by respondent Nancy

	Drew Suders and amicus curiae Lawyers' Committee for Civil Rights Under Law.
Mar 19 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 19 2004	Motion for leave to allow Lawyers' Committee for Civil Rights Under Law to participate in oral argument as amicus curiae and for divided argument DENIED.
Mar 22 2004	Reply of petitioner Pennsylvania State Police filed. (Distributed)
Mar 31 2004	Argued. For petitioner: John G. Knorr, III, Chief Deputy Attorney General, Harrisburg, Penn; and for the United States, as amicus curiae, Irving L. Gornstein, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Donald A. Bailey, Harrisburg, Pa.

Supreme Court, U.S.
FILED
JUL 14 2003

No. 03 - 95

In the Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner

v.

NANCY DREW SUDERS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the affirmative defense recognized in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)?

PARTIES TO THE PROCEEDING

The petitioner is the Pennsylvania State Police, an agency of the Commonwealth of Pennsylvania.

The respondent is Nancy Drew Suders.

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 325 F.3d 432 and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The decision of the District Court is not reported, but is reprinted at Pet. App. 62a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 2003, and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

§ 2000e. Definitions.

For the purposes of this subchapter —

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees ... and any agent of such a person....

§ 2000e-2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex, or national origin....

STATEMENT OF THE CASE

This is an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The employee claims that she was constructively discharged — that is, she was forced to quit her job — because her supervisors subjected her to an atmosphere of sexual harassment and discrimination which made her working conditions intolerable. The Court of Appeals held that, when precipitated by the actions of a supervisor, a constructive discharge is a "tangible employment action" within the meaning of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998), thereby precluding the employer from offering the affirmative defense recognized by those cases, and instead subjecting the employer to strict liability for the actions of its supervisors. Nevertheless, the Court of Appeals acknowledged that the courts of appeals and other federal courts are deeply divided over this issue, and acknowledged as well that its decision would create "thorny evidentiary issues" for trial courts. The Court should therefore take this opportunity to resolve this issue, which is of considerable practical importance in employment discrimination law.

1. The respondent, Nancy Drew Suders, worked for the petitioner, the Pennsylvania State Police, as a police communications operator. Respondent began work in March of 1998, and was assigned to work at the State Police barracks in McConnellsburg, Pennsylvania. Pet. App. 62a-63a. The station commander at the McConnellsburg barracks was Sergeant Eric Easton; two State Police corporals, William Baker and Eric

Prendergast, also exercised some supervisory authority over respondent. Pet. App. 8a-9a.

Respondent claimed[1] that Easton, Baker and Prendergast began harassing her on a daily basis shortly after she began working at the barracks. Pet. App. 64. The harassment included repeated attempts to engage her in discussions of bestiality, oral sex and genital piercing; repeated re-enactments — five to ten times a shift, even after respondent asked that it stop — of a "wrestling move" in which Baker would "grab hold of his private parts and yell suck it"; intimidating acts such as hitting office furniture; and various other sexually charged posturing, leering and remarks. Pet. App. 64a-66a.

Respondent was aware of the State Police's policy against sexual harassment, and the policy was both posted at the McConnellsburg barracks and distributed to all employees. Pet. App. 78a-79a. In June of 1998, as part of her training, respondent attended a class in sexual harassment taught by the State Police's affirmative action officer, Virginia Smith-Elliot. Respondent told Smith-Elliot that she might need some help, but did not supply any details. She obtained Smith-Elliot's telephone number, but did not contact her again until two months later, two days before she resigned. On August 18, respondent telephoned Smith-Elliot and told her that she was being harassed. According to respondent, Smith-Elliot told her to fill out a complaint

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[1]The District Court resolved this case by granting the petitioner's motion for summary judgment, and we, like the courts below, therefore recite the facts in the light most favorable to respondent.

form, but respondent was unable to find the form and Smith-Elliot did not offer to send her one.[2] Pet. App. 67a.

Two days later, on August 20, 1998, respondent quit the State Police. Respondent had several times taken a test on her computer skills. Each time, her supervisors told her that she had failed, but she believed that they had lied to her and had not turned in her test results. She went through a drawer in the women's locker room, found her test papers and removed them.[3] After the loss of these papers was discovered, officers dusted the drawer with theft detection powder. On August 20, respondent again went through the drawer — to return her test papers, she said — and the powder turned her hands blue. When Corporal Baker confronted her, respondent told him that she was resigning. She claims that she was not allowed to leave the barracks, but was treated as a suspect, photographed and questioned.[4] She turned in a letter of resignation which she had been carrying with her, and eventually was permitted to leave. Pet. App. 11a-12a, 68a-69a.

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[2]Smith-Elliot testified that respondent complained that she was being discriminated against because of her age and political affiliation, but did not mention any sexual harassment; and that she promised to send a complaint form to respondent. Pet. App. 11a, 67a.

[3]Respondent contended that the drawer was not assigned to anyone in particular, while others said that the drawer was assigned to another officer and contained her personal belongings. Pet. App. 11a-12a, 68a.

[4]Sergeant Easton testified that, after respondent was questioned about the blue on her hands, she was told to take the rest of the evening off. Pet. App. 68a.

2. Respondent filed this action in the District Court pursuant to Title VII,[5] claiming that she had been "forced to endure an insulting and humiliating work environment and ... forced to suffer a termination of employment." Pet. App. 69a (quoting complaint). After discovery, the petitioner moved for summary judgment, which the District Court granted.

The District Court, viewing the facts in the light most favorable to respondent, held that genuine issues of material fact remained on the issue of whether respondent had been subjected to a hostile work environment. Pet. App. 74a-77a. Nevertheless, the District Court granted judgment to the petitioner, on the ground that even if a hostile environment existed, petitioner had established an affirmative defense to vicarious liability for its supervisors' actions. The District Court relied on *Faragher v. City of Boca Raton, supra*, which recognized an affirmative defense against claims of "an actionable hostile environment created by a supervisor ... [w]hen no tangible employment action is taken."

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Pet. App. 77a, *quoting Faragher*, 524 U.S. at 807-08. *See also Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765 (same).

The District Court held that petitioner had in place both an anti-harassment policy and a corrective mechanism, that respondent was aware of both, but that she had not attempted to take advantage of them until two days before she resigned; thus, "the [petitioner] was never given the opportunity to respond to any complaints of sexual harassment." Pet. App. 80a. The District Court therefore concluded that respondent had "failed to avail herself of [petitioner's] internal procedures for reporting any harassment," and granted petitioner's motion for summary judgment. *Ibid.* The District Court did not separately address respondent's claim that her resignation as the result of the hostile environment was in reality a constructive discharge.

3. The Court of Appeals reversed the District Court's judgment. The Court of Appeals found two "fundamental[] flaws," Pet. App. 20a, in the District Court's analysis. First, the Court of Appeals held that it was "unclear whether the PA State Police exercised reasonable care to prevent or correct the sexual harassment that Suders claimed she suffered," and that these material disputes of fact precluded summary judgment on the petitioner's

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[5]In addition to her claim of sex discrimination under Title VII, respondent also raised claims of age and political affiliation discrimination, and sought relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Pennsylvania Human Relations Act, Pa. Cons. Stat., tit. 43, § 951 *et seq.* She sued, in addition to petitioner, Sergeant Easton, Corporals Baker and Prendergast, and Ms. Smith-Elliot. Pet. App. 69a. The District Court resolved all of these claims against respondent. *See* Pet. App. 70a-74a, 80a-81a. Respondent appealed, however, only as to the Title VII sex discrimination claim against the State Police, Pet. App. 15a-16a, and that is the only claim involved in this petition.

affirmative defense to the hostile environment claim.[6] *Ibid.*

Second, "and more importantly," the District Court had failed to consider respondent's claim of constructive discharge. *Ibid.* The Court of Appeals first held that, on the record presented for summary judgment, a jury might find that respondent had in fact been constructively discharged. Pet. App. 26a-28a. The Court of Appeals then considered whether petitioner should be permitted to assert the *Ellerth/Faragher* affirmative defense to this claim.

> *Ellerth* and *Faragher* hold that an employer is strictly liable to a victimized employee for the harassment or discrimination of its supervisors if the harassment or discrimination resulted in a tangible employment action. In that case, an employer is precluded from invoking the affirmative defense. If, however, the harassment or discrimination did not amount to a tangible employment action, the employer is entitled to assert the affirmative defense.

App. 28a. The Court of Appeals thus turned to what it called the "critical issue in this case: whether a constructive discharge, when proved, constitutes a tangible employment action." Pet. App. 28a-29a. After an extensive discussion, *see* Pet. App. 28a-57a, the Court of Appeals concluded that it does.

The Court of Appeals first "recognize[d] a division among the Courts of Appeals as to this issue." Pet. App. 39a. Both the Second and the Sixth Circuits had held that a "constructive discharge does not constitute a

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[6]Petitioner does not challenge this aspect of the Court of Appeals' decision.

'tangible employment action' as that term is used in *Ellerth* and *Faragher*." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), *quoted at* Pet. App. 39a. *Accord Turner v. Dowbrands Inc.*, 2000 WL 924599 (6th Cir. 2000)(unpublished), *cited at* Pet. App. 40a-41a. The Eighth Circuit, on the other hand, had held that a constructive discharge does constitute a "tangible employment action." Pet. App. 41a-42a, *citing Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) and *Jackson v. Arkansas Dep't of Ed.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002). The Court of Appeals noted that district courts which had addressed the issue were likewise divided. Pet. App. 42a (collecting cases). Finally, both the Seventh and the Ninth Circuits had recognized, but not decided, this issue. Pet. App. 42a-43a, *citing Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 n. 8 (9th Cir. 2001) and *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 666-67 (7th Cir. 2001).

In a lengthy discussion, *see* Pet. App. 45a-53a, the Court of Appeals rejected the reasoning of *Caridad* and similar cases as unpersuasive. The Court of Appeals proceeded to its own analysis, and concluded that a constructive discharge does constitute a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. Where a constructive discharge has occurred, then, the employer may not assert the *Ellerth/Faragher* affirmative defense; and if the existence of a constructive discharge is in dispute at the summary judgment stage, the employer may not seek summary judgment on the basis of the affirmative defense. Pet. App. 57a.

In reaching its conclusion, the Court of Appeals relied primarily on the idea, established in circuit precedent, that a constructive discharge is the "functional equivalent

of an actual termination." Pet. App. 50a, *citing Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir.1996). A constructive discharge, like a formal termination, constitutes a "significant change in employment status," and inflicts "direct economic harm" on the employee, Pet. App. 50a; and these, in the Court of Appeals' view, are the "primary attributes" of a "tangible employment action." Pet. App. 54a. The Court of Appeals also thought that imposing strict liability on employers for constructive discharges would "encourage employers to be watchful of sexual harassment ... and to remedy complaints at the earliest possible moment," Pet. App. 56a; while the contrary holding could have the "perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment." Pet. App. 55a.

The Court of Appeals conceded that the elements of a constructive discharge overlap with the elements of the *Ellerth/Faragher* affirmative defense. Pet. App. 58a. Establishing a constructive discharge entails an enquiry into whether the employee's decision to resign was reasonable, and therefore

> it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs. These are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*.

Ibid. Thus, there is a "substantial risk" that evidence amounting to the affirmative defense might come in through the "back door," even in cases where, under the Court of Appeals' approach, the affirmative defense is not available. Pet. App. 58a-59a. Nevertheless, the Court of

Appeals discounted this risk, confident that the "wisdom and expertise of trial judges," Pet. App. 60a, would enable them to deal with these "thorny evidentiary issues." Pet. App. 58a.

REASONS FOR GRANTING THE WRIT

I. The Federal Courts Are Deeply Divided Over the Availability of the *Ellerth/Faragher* Affirmative Defense in Cases Claiming a Constructive Discharge.

In the five years since the Court decided *Ellerth* and *Faragher*, the federal courts have considered the question presented by this case on many occasions, but have been unable to reach a consensus. Rather, the courts have coalesced around two competing and irreconcilable views.

The Eighth Circuit, now joined by the Third, holds hat a constructive discharge which results from a supervisor's harassment is a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. *See Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) ("constructive discharge constitutes a tangible employment action which precludes an employer from utilizing the affirmative defense"). The Fifth Circuit, while it has not addressed the issue directly, has suggested that it agrees. *See Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 410 n. 15 (5th Cir. 2002) (for purposes of *Ellerth/Faragher* affirmative defense, plaintiff "does not advance a coherent claim of constructive discharge or other tangible employment actions").

The Second and Sixth Circuits, on the other hand, hold that a constructive discharge under such circumstances does not constitute a "tangible employment action." *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999), *cert.*

denied, 529 U.S. 1107 (2000) ("constructive discharge is not a tangible employment action warranting the imposition of strict liability under the *Ellerth/Faragher* standard"); *Turner v. Dowbrands, Inc.*, 2000 WL 924599 (6th Cir., June 26, 2000) (unpublished) (following *Caridad*). The First Circuit has likewise held that a constructive discharge resulting from supervisor harassment was not a "tangible employment action," while leaving open the possibility that on "rare facts," it might hold otherwise. *Reed v. MBNA Marketing Systems, Inc.*, — F.3d —, 2003 WL 21403692, *4 (1st Cir., June 19, 2003).[7] And the Tenth Circuit, while it has not decided the issue, has suggested that it too agrees with the Second Circuit. *See Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1231-32 (10th Cir. 2000) (citing *Caridad* with approval for the proposition that "'tangible employment action' is not synonymous with 'constructive discharge'").

This division among the courts of appeals has been widely recognized. *See, e.g.*, Pet. App. 39a; *Reed v. MBNA Marketing Systems, Inc.*, at *3 n. 2; *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 n. 8 (9th Cir. 2001). It is replicated by a similar division among the district courts, *see* Pet. App. 41a-42a & n. 14 (collecting cases)[8];

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[7]The First Circuit suggested that this result might change only where the constructive discharge results from actions which themselves would constitute tangible employment actions: "*official* actions by the supervisor — e.g., an extremely dangerous job assignment to retaliate for spurned advances...." *Ibid* (emphasis in original).

[8]*See also Martin v. Inhabitants of City of Biddeford*, 2003 WL 1712510, *11 (D.Me., April 1, 2003) (not a tangible employment action); *Munroe v. Compaq Computer Corp.*, 229 F.Supp.2d 52, 62 (D.N.H. 2002) (same); *cf. Chavera v. Victoria Ind. Sch. Dist.*, (continued...)

and shows no sign of resolving itself. The issue has been thoroughly aired in the lower courts, which are locked in disagreement, and the Court should now resolve it; for as the Court of Appeals noted and as we discuss below, this issue is of "critical importance to civil actions brought ... pursuant to Title VII." Pet. App. 4a.

II. This Is a Recurrent and Important Issue in Federal Employment Discrimination Law, on Which the Court Should Establish a Uniform and Predictable Federal Standard.

The Court first addressed standards of employer liability for the actions of supervisors in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The Court held in *Meritor* that Congress did not intend in Title VII that employers be "always automatically liable for sexual harassment by their supervisors"; and while the Court declined to issue "a definitive rule on employer liability," the Court did hold that the courts should look to traditional agency principles for guidance. *Id.*, at 72. In the wake of *Meritor*, the courts of appeals "struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees," *Faragher*, 524 U.S. at 785; and the Court provided further guidance in *Faragher* and *Ellerth*, emphasizing the importance of establishing a "uniform and predictable standard ... as a matter of federal law." *Ellerth*, 524 U.S. at 754. This case represents the next step in establishing that "uniform and predictable standard."

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[8](...continued)
221 F.Supp.2d 741, 747-48 (S.D.Tex. 2002) (tangible employment action).

As the cases cited in the preceding section illustrate, the federal courts, and of course employers and employees, frequently confront the issue presented by this case, and there is no question but that it will continue to recur. Nationally, the EEOC reports that it received over 84,000 charges of employment discrimination in fiscal year 2002[9]; during the same period, over 20,000 employment discrimination actions were filed in the federal district courts.[10] Even if only a small fraction of these cases involve claims of constructive discharges,[11] thousands of employers and employees are affected by this issue every year. Employers and employees require a "uniform and predictable standard" by which to guide their conduct, both in the workplace and in litigation, and the federal courts require it in order properly to resolve the disputes which come before them. The Court should provide them with the necessary guidance.

CONCLUSION

The Court should grant the petition.

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[9]EEOC, *Charge Statistics FY 1992 through FY 2002*, available at http://www.eeoc.gov/stats/charges.html (visited July 9, 2003).

[10]ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *Judicial Business of the United States Courts: 2002 Report of the Director* at 130 (Table C-2).

[11]The EEOC reports that in 2002, among filed charges alleging discrimination on the basis of national origin, about 7% included claims of constructive discharge. *See* EEOC, *National Origin Charge Data by Issue — Receipts*, available at http://www.eeoc.gov/origin/no_receipts.html (visited July 9, 2003).

Respectfully submitted,

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July 14, 2003

APPENDIX

PRECEDENTIAL
Filed April 16, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3512

NANCY DREW SUDERS,
Appellant,

v.

ERIC D. EASTON, WILLIAM D. BAKER, ERIC B. PRENDERGAST, VIRGINIA SMITH ELLIOTT, AND THE PENNSYLVANIA STATE POLICE

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court Judge: The Honorable Sylvia H. Rambo
(00-CV- 01655)

Argued on April 11, 2002
Before: MCKEE and FUENTES, *Circuit Judges*, and POGUE,* *Judge*

(Opinion Filed: April 16, 2003)

Don Bailey (argued)
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*The Honorable Donald C. Pogue, United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

FUENTES, Circuit Judge:

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court addressed the scope of the vicarious liability of an employer for the discriminatory and harassing conduct of its supervisors in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The Court also sought to clarify the confusion among the Courts of Appeals as to the scope and proper grounds for such liability. To that end, the Court held that an employer shall be strictly liable to a victimized employee for an actionable hostile work environment created by a supervisor, when the discrimination or harassment at issue results in a

"tangible employment action."[1] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Furthermore, the Court defined a tangible employment action in general, categorical terms: "a significant change in employment status," often, but not always, resulting in economic injury. *Ellerth*, 524 U.S. at 761-62; *see also Faragher*, 524 U.S. at 808. A tangible employment action was also defined by reference to a non-exclusive list of possible actions: "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790. When no tangible employment action results, the employer may still be liable, but it may raise an affirmative defense to liability or damages. The affirmative defense has two components: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

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[1]The concept of a tangible employment action is distinct from that of a materially adverse employment action which is a necessary element of a prima facie case under Title VII. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir.1997); *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). Litigants, and oftentimes courts, confuse the two. *See Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 743-44 (7th Cir.2002) (discussing courts' use of the terms "tangible employment action" and "materially adverse employment action."). Courts have yet to address the differences between them. It is worth noting generally that because *Ellerth* and *Faragher* create a rule of strict liability, we understand a tangible employment action as being a narrower, more restricted category of actions occurring in the workplace.

Against this backdrop, the matter on appeal raises novel issues of law of critical importance to civil actions brought in our Circuit pursuant to Title VII. Among those we are asked to review, we address today the issue of whether a constructive discharge constitutes a tangible employment action, such that the affirmative defense to the liability of an employer for the discriminatory conduct of its supervisors would not be available to the employer. Although our analysis is informed by the Supreme Court's decisions in *Ellerth* and *Faragher,* our ruling today necessarily reaches issues that were not specifically addressed by the Court in either of those two decisions.

In the underlying action, plaintiff Nancy Drew Suders ("Suders") alleged that she was subjected to a sexually hostile work environment and discriminated against on the basis of her age and political affiliation. She also contended that she was constructively discharged. Suders identified three officers of the Pennsylvania State Police ("PA State Police") as the primary harassers and sought to hold the PA State Police vicariously liable for the actions of its agents. After the close of discovery, defendants moved for summary judgment. The District Court granted the motion in its entirety. As to her claim of a sexually hostile work environment, the District Court found that, although Suders had raised genuine issues of material fact as to each requisite element, the PA State Police was entitled to raise the affirmative defense set forth in *Ellerth* and *Faragher.* Having found that the PA State Police met its burden of establishing the affirmative defense, the District Court granted summary judgment as to Suders's claim of a sexually hostile work environment. The Court failed to address Suders's claim of constructive discharge and whether such a claim would affect the availability of the PA State Police's assertion of the affirmative defense.

We will reverse the District Court's judgment as to Suders's claim of a sexually hostile work environment. In so doing, we hold that a constructive discharge, when proved, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher.* Consequently, when an employee has raised a genuine issue of material fact as to a claim of constructive discharge, an employer may not assert, or otherwise rely on, the affirmative defense in support of its motion for summary judgment.

I.

A. Background[2]

Suders is a wife and mother of three children. From approximately 1988 until her employment with the PA State Police, Suders was Chief Deputy Sheriff and Secretary to the Fulton County Sheriff. She had a wide array of responsibilities, including bookkeeping, transporting prisoners, serving warrants, and administering special programs. Suders also served as an active member of the local chapter of the Republican Party. In connection with her political activities, she became acquainted with Mikael Fix, the Republican County Chairman, and Robert Jubelirer, a State Senator. Sometime in 1998, these individuals suggested to Suders that she apply for an open position with the PA State Police. When she decided to apply, Chairman Fix assisted Suders in her application.

During the pendency of her application and before accepting a position, Suders heard from the Fulton County Sheriff that officers of the PA State Police were

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[2]In our review of the factual background, we must resolve all factual doubts and draw all reasonable inferences in favor of Suders, the party opposing the motion for summary judgment. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1077 n. 1 (3d Cir.1996).

opposed to her candidacy because they viewed her as a political appointment. The extent to which Republican party officials intervened on behalf of Suders is unclear. Nevertheless, Chairman Fix eventually told Suders that the PA State Police had approved her application.

Suders accepted a position as a police communications operator ("PCO") with the PA State Police and commenced her employment on or about March 23, 1998, at the McConnellsburg barracks. Her employment began with a probationary period, during which Suders worked alongside another PCO. In June 1998, Suders attended a formal, two-week training program, after which she undertook the duties of a PCO by herself.

Starting from her probationary period and steadily escalating after her two-week training period, Suders alleged that she suffered mistreatment and sexual harassment so severe that she ultimately felt compelled to resign on August 20, 1998. She recounts several instances of name-calling, repeated episodes of explicit sexual gesturing, obscene and offensive sexual conversation, and the posting of vulgar images. According to Suders, the following defendants were the main perpetrators of the sexual harassment that she allegedly suffered: Sergeant Eric D. Easton ("Easton"), Station Commander of the McConnellsburg barracks; Patrol Corporal William D. Baker ("Baker"); and Corporal Eric B. Prendergast ("Prendergast").

As Station Commander, Sergeant Easton was responsible for the day-to-day supervision of the McConnellsburg barracks. Even before she commenced her employment with the PA State Police, Suders encountered problems with Easton. Easton told Suders that he had some concerns about her and that anything she would say would simply be her word against his. Suders also recalled that every time she would go into

Easton's office, "he would bring up [the subject of] people having sex with animals.... [T]hat's all the man wanted to talk about." *Suders v. Easton*, No. 00-CV-1655, slip op., at 3 (M.D.Pa. Aug. 16, 2001) (the *"Decision"*) (quotations and citations omitted). Easton and Prendergast often had discussions in front of Suders, and on one occasion, Easton stated that "if someone had a daughter, they should teach her how to give a good blow job!" App. at 151. Easton once commented to Suders that his wife had small breasts.

Easton also made disparaging remarks about Suders's age. he commented to Suders that "[i]t is awful getting old, isn't it Nancy?" *Decision*, at 2 (quotations and citations omitted). Easton also remarked that "a 25-year-old could catch on faster than [Suders] could." *Id.* at 3 (quotations and citations omitted).

The sexually charged nature of Easton's conduct toward Suders was not limited to conversation. She was offended "when Defendant Easton, wearing spandex shorts, would sit down in the chair [near Plaintiff's work space], put his hands behind his head and spread his legs apart." *Id.* (quotations and citations omitted). She claimed that Easton would leer at her. Suders conceded that Easton never made any overt sexual advances towards her, but she had no idea "what he was going to do." *Id.* (quotations and citations omitted). Suders avoided Easton to the extent possible.

Easton did not deny making many of the statements above; instead he claimed that Suders misinterpreted them. As to the statements concerning Suders's age, Easton allegedly made them in order to defend Suders and to explain why she might be having trouble catching on to the job. With regard to the statements concerning bestiality and oral sex instruction, Easton claimed that they pertained to actual investigations. Easton also noted

that Suders was generally disorganized, frequently late for work, and easily overwhelmed by her job responsibilities. When he attempted to offer constructive criticism, he claimed that Suders did not handle it well.

As a Patrol Corporal at the McConnellsburg barracks, defendant Baker also had a supervisory role at the station.[3] According to Suders, Baker was responsible for the most inflammatory harassment that she suffered. Soon after she began working at the communications desk by herself, Suders recalled that Baker had a habit of making obscene gestures to her, as many as five to ten times per night throughout her five-month tenure at the station. These gestures followed the same pattern. In an apparent imitation of a move popularized by televised wrestling, Baker would "cross his hands, grab hold of his private parts and yell, suck it." App. at 65. Suders recalled that "[t]he man did this, and he would beat on it. He would beat his hands on his crotch too and yell suck it. He would ask me to do this garbage.... All he wanted to do was play with his crotch." *Id.* at 65-66. Suders claimed that Baker kept a picture near his work space of a professional wrestler performing this same gesture. In between these offensive acts, Baker would take time to rub his rear end in front of her and remark "I have a nice ass, don't I?" *Id.* at 67. Another time, Baker announced to Suders, without invitation, that he intended to pierce his genitals and that his wife would pierce her nipple. Baker also referred to Suders as "momma." *Decision,* at 5 (quotations and citations omitted).

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[3]Sergeant Easton explained that "[e]ach corporal had some similar duties as far as running the shift, responding to incidents depending on the severity of the incident, and each corporal had some specialized duties.... Then each corporal also had specific personnel assigned to them to supervise." App. at 215.

On one occasion, Suders confronted Baker about his offensive conduct, specifically about his repeated gestures. She told him "I don't think you should be doing this." App. at 66. According to Suders, Baker responded by grabbing a straight back chair in the communications room, jumping onto it, and repeating the move, including the verbal exclamation.

As a Corporal, defendant Prendergast shared some supervisory authority with Baker.[4] Suders contended that Prendergast verbally harassed her day after day. He called Suders a liar and told her that "the village idiot could do her job." App. at 69. She also testified that Prendergast would wear black gloves, pound on the furniture in the communications room, and intimidate her. According to Suders's complaint filed on September 18, 2000, Prendergast allegedly told her that she would be "the last political appointee who had a job there at the substation." *Id.* at 30.

As often happens in cases involving allegations of sexual harassment, the defendants' recollections of the events differ from Suders's. The testimony of the PA State Police officers is notable, however, for its internal inconsistencies and ambiguities. For instance, Baker adamantly denies that he ever performed the wrestling gesture in front of Suders. When asked if he ever saw this harassment take place, however, Prendergast seemed to deny any recollection at first, but then conceded that he may have seen Baker perform it on one occasion. *Id.* at 252.

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[4]As Easton noted, "Eric Prendergast I believe was the corporal who was assigned to [Suders], but if he was not working say a three to eleven shift, then it would be whatever corporal was working that shift would be in charge of the shift." App. at 224.

As noted above, Suders attempted to confront at least one of the defendants, Baker, by asking him to stop the offensive conduct. She did not, however, report any of the incidents to anyone else at the McConnellsburg barracks. In her own words, Suders explained that "there was no one on that station that I could go to. I had a sergeant there who was talking about abusing children and bestiality. There was no way I was going to be able to tell him. There was nobody." *Id.* at 68.

In the summer of 1998, the relationship between Suders and the defendants rapidly deteriorated in a series of events that led to her departure. It began when an accident file turned up missing. Baker asked Suders if she had the misplaced file, and when she responded that she did not, Prendergast accused her of taking the file home. *Decision,* at 5.

At this point, the situation was critical enough that Suders sought help from persons outside the McConnellsburg barracks. During her formal training in June 1998, Suders approached defendant Virginia Smith-Elliott ("Smith-Elliott"), who, in her capacity as Equal Employment Opportunity Officer of the PA State Police, had taught a training class on sexual harassment that Suders had attended. Without mentioning details, Suders told Smith-Elliott that she might need some help. Smith-Elliott gave Suders her phone number. Neither Suders nor Smith-Elliott followed up on the matter.

On July 22, 1998, Suders received a supervisor's notation for failing to complete an assignment given to her back in May. Days later, on July 26, 1998, Suders was reprimanded again, ostensibly because she had not properly disseminated information about an escaped convict from Ohio. Suders claimed that she received advice from someone at the station that she need not worry about the message because the escapee was from

Ohio. Based on that advice, Suders simply placed the information in a Corporal's bin. During this time period, the sexual harassment noted above continued unabated.

On or about August 18, 1998, Suders reached a breaking point. She contacted Smith-Elliott again, and this time, Suders specifically mentioned that she was being harassed and that she was afraid. According to Suders, Smith-Elliott was insensitive and unhelpful. Smith-Elliott instructed her to file a complaint on a standard form without telling Suders where to obtain the form. Suders attempted to find the correct form in employee manuals, but never found it. She was fearful that Prendergast was watching her every move. For her part, Smith-Elliott acknowledged that Suders contacted her around then, but that Suders never mentioned any incidents of sexual harassment, complaining only of age and political affiliation discrimination. Smith-Elliott also recalled that she promised to send Suders the proper complaint form.

Two days after the phone conversation with Smith-Elliott, one final incident proved to be the last straw. Suders alleged that, on August 20, 1998, the other officers set her up and falsely accused her of theft. The events leading up to the incident occurred as follows. Officers of the PA State Police were required to take an exam designed to measure computer skills. The results were supposed to be sent to Hollidaysburg, where the department in charge of officer education was located. Suders took the exam several times, and each time her supervisors told her that she had failed. She believed that the officers lied to her about the test results and that they never sent her test scores to Hollidaysburg because she found her exams in a set of drawers in the women's locker room. Suders contended that those drawers were not assigned to any specific officer, while the PA State

Police countered that the drawers contained another PCO's private belongings.

At some point, the officers realized that Suders's test results were missing. The officers dusted the drawers and the file inside with a theft detection powder that is invisible to the eye, but reacts when touched by hand, thereby turning the hand of a suspected thief blue. Suders testified that, on that day, she sought to return the papers that she had earlier obtained. Her hands turned unmistakably blue. When the officers in the barracks apprehended Suders, they treated her as they would an accused suspect. She was handcuffed, photographed, and questioned. She felt "abused, threatened and held against her will." *Decision*, at 7 (quotations and citations omitted).

Any prospect for reconciliation was now lost. Suders had prepared a written resignation prior to the events of August 20, 1998 and had been carrying it with her. After the accusation of theft and the questioning by her supervisors, Suders tendered her resignation. When Suders attempted to leave the barracks, Baker told her that she could not leave because she was a "suspect." *Id.* Later, the officers took Suders into an interrogation room, where Easton advised Suders of her *Miranda* rights. After being detained for further questioning, Suders demanded to be released. When Suders reiterated her intent to resign, Easton ultimately permitted her to leave.

B. The District Court's Decision

In the underlying action, Suders asserted that she was discriminated against on the basis of age, political affiliation, and sex. Her claims were based on the following statutes: (1) the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"); (2) Title VII; and (3) the Pennsylvania Human Relations Act,

43 PA. CONS.STAT. ANN. § 951, *et seq.* ("PHRA"). Suders brought all three claims against Easton, Baker, Prendergast, Smith-Elliott, and the PA State Police.

After the close of discovery, defendants moved for summary judgment. The District Court granted the motion in its entirety. First, the District Court held that neither Title VII nor the ADEA contemplates the liability of individual employees. The Court cited our decisions in *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 184 (3d Cir.1997), and *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3d Cir.1996), in granting summary judgment in favor of the individual defendants on Suders's Title VII and ADEA claims.

With respect to Suders's ADEA claim against the PA State Police, the Court held that the Eleventh Amendment barred the claim against a state agency. *Decision*, at 12 (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91(2000)). The Court also noted that, because Eleventh Amendment immunity extends to similar claims based on state law causes of actions, Suders's PHRA claim against the PA State Police was also barred.

With regard to the PHRA claims against the individual defendants, the defendants argued that the Eleventh Amendment immunity enjoyed by the PA State Police also barred any claim against a state official for actions taken within the course of employment. Therefore, the defendants contended that, to the extent that the PA State Police was immune from Suders's claim under the PHRA, the individual defendants were also immune from those claims. The District Court observed that Suders had not responded to this argument and, therefore, granted summary judgment in favor of the individual defendants on the PHRA claims.

The District Court's analysis left Suders with two claims pursuant to Title VII: her hostile work environment and constructive discharge claims against the PA State Police. The Court found that Suders had marshaled enough evidence to raise a genuine issue of fact as to each of the following elements of a Title VII action against an employer: (1) the work environment was sufficiently hostile to constitute intentional discrimination; (2) the discrimination was pervasive and regular; (3) the defendants' conduct detrimentally affected Suders; and (4) the defendants' conduct was sufficiently hostile to offend a reasonable person. *Decision*, at 13-15 (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir.1990)).[5]

On the issue of vicarious liability, however, the District Court proceeded with an analysis of the affirmative defense set forth in *Ellerth* and *Faragher*. In that regard, the Court found that "as a matter of law ... [Suders] unreasonably failed to avail herself of the [PA State Police's] internal procedures for reporting any harassment. This is especially true as [Suders] had personal contact with the Affirmative Action officer early in her employment, but failed to pursue this avenue of complaint." *Decision*, at 18. Therefore, the District Court found no genuine issue of material fact as to the PA State Police's assertion of the affirmative defense. The Court thus granted the motion for summary judgment on Suders's remaining claim pursuant to Title VII.

The District Court did not address Suders's claim of constructive discharge. As a result, the Court never reached the issue of whether the claim of constructive discharge would affect the availability of the affirmative defense invoked by the PA State Police.

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[5]*See* part III.A, *infra*. for a discussion of the *Andrews* test.

II.

The District Court had jurisdiction over the underlying action pursuant to 28 U.S.C. §§ 1331, 1343 and 1367. We have jurisdiction to review the final order of the District Court pursuant to 28 U.S.C. § 1291.

Our review of the District Court's grant of summary judgment is plenary. *See Doe v. County of Centre, PA*, 242 F.3d 437, 446 (3d Cir.2001). As we have stated in the past, in the context of summary judgment, we must apply the same test that the District Court applied. *See id.; Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1229 (3d Cir.1988).

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant a motion for summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We must view the evidence presented to the trial court, and any reasonable inferences drawn therefrom, in the light most favorable to the non-moving party. *See Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir.2002). When the factual assertions of the party opposing the motion conflict with those of the movant, we must resolve those conflicts in favor of the former. *See Levendos*, 860 F.2d at 1229 (citing *Jackson v. University of Pittsburgh*, 826 F.2d 230, 232 (3d Cir.1987), *cert. denied*, 484 U.S. 1020 (1988)).

III.

Our analysis begins with the specific claim which Suders appeals, that is, her claim of a sexually hostile

work environment pursuant to Title VII. Then, we address the propriety of the District Court's decision to permit the PA State Police to invoke the affirmative defense to strict liability.

A. Suders's Claim of a Sexually Hostile Work Environment

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e- 2(a)(1). In *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65-67 (1986), the Supreme Court recognized that an employee who has been sexually harassed has a cause of action pursuant to Title VII if the sexual harassment at issue was either a *quid pro quo* scenario, or if the harassment was so pervasive that it had the effect of creating a hostile work environment and of altering the conditions of employment. In the present case, Suders alleged a violation of Title VII based on the second scenario set forth in *Meritor:* a hostile work environment at the McConnellsburg barracks.

Shortly after the Supreme Court's decision in *Meritor,* we addressed a number of issues relating to the burgeoning jurisprudence of sexual harassment. *See Andrews,* 895 F.2d at 1482. In *Andrews,* we held that an employee seeking to bring a hostile work environment claim against his or her employer must establish the convergence of the factors: (1) the employee suffered intentional discrimination because of his or her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the employee; and (4) the discrimination would detrimentally affect a

reasonable person of the same sex in that position.[6] 895 F.2d at 1482; *see also Knabe v. The Boury Corp.,* 114 F.3d 407, 410 (3d Cir.1997).

In *Andrews,* we also discussed a plaintiff's burden with respect to each of the factors. With regard to the first factor, we noted that intentional discrimination is implicit in cases involving "sexual propositions, innuendo, pornographic materials, or sexual derogatory language." *Andrews,* 895 F.2d at 1482 n. 3. In such cases, the intent to discriminate "should be recognized as a matter of course." *Id.* The second factor requires that the "incidents of harassment occur either in concert or with regularity." *Id.* at 1484 (quotations and citations omitted). The third factor is a subjective inquiry of whether the particular plaintiff was demonstrably injured. *See id.* at 1483. And the fourth factor injects a requirement of objectivity: it ensures that employers are held liable only when the work environment is hostile from the standpoint of a reasonable person. *See id.* at 1483 (noting the need to protect employers from "hypersensitive" employees, but recognizing "the goal of equal opportunity" and "the walls of discrimination that deprive women of self- respecting employment.").

When assessing the relevant factors, we are reminded to view the record as a whole and admonished against focusing on either one particular factor or a specific

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[6]The fifth factor of the *Andrews* test is respondeat superior liability. Of course, in the context of the vicarious liability of an employer for the acts of its supervisors, the analysis under the fifth factor is materially altered by the Supreme Court's decisions in *Ellerth* and *Faragher.* Accordingly, we devote Part III.C, *infra,* to discussing this issue. For present purposes, our discussion of Suders's hostile work environment claim is limited to the first four factors.

incident: "Particularly in the discrimination area, it is often difficult to determine the motivations of an action and any analysis is filled with pitfalls and ambiguities. A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Id.* at 1484; *see also Knabe,* 114 F.3d at 410.

With these principles in mind, we agree with the District Court insofar as it held that Suders had raised genuine issues of material fact as to her claim of a sexually hostile work environment. Drawing all reasonable inferences in her favor, Suders established all of the following:

> (1) her own Station Commander had a preoccupation with discussing bestiality and oral sex with her;
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> (2) Easton's "conversations" were accompanied by leering and suggestive posturing — conduct that Suders found offensive;
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> (3) Baker routinely engaged in sexually-charged acts intended to humiliate or demean Suders, even after he was politely asked to stop. Viewed in the most generous light, his repeated reenactments of the wrestling move were indicative of an immense immaturity and could reasonably be perceived as innuendo; and
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> (4) When not making offensive gestures with his crotch, Baker attempted to engage Suders in conversations about piercing his genitals.

Although this brief summary does not catalog all of the offensive conduct alleged, it is sufficient to show that a reasonable jury could find that the work environment

at the McConnellsburg barracks was rife with hostility and sexual innuendo. There is no question that under the standard set forth in *Andrews,* Suders has raised genuine issues of material fact as to the intentional nature of the discrimination at the McConnellsburg barracks.

It is also clear that Suders offered evidence sufficient to establish a pattern of sexual harassment that was pervasive and regular. Particularly telling is Baker's repetition of the wrestling move five to ten times per shift. In addition, Easton's conduct, although not daily, occurred with regularity. Together, Baker's and Easton's conduct is sufficient to raise a genuine issue of material fact as to the second factor in *Andrews.*

In addition, both the subjective and objective components of the *Andrews* test are satisfied here. Because of the severe and pervasive harassment of her supervising officers, Suders felt that her only recourse was to draft a resignation letter. With respect to the objective standard, the District Court found that "there was enough conduct in the instant action to raise an issue of fact that the atmosphere was sufficiently hostile to offend a reasonable person in Plaintiff's position. Most persuasive is Plaintiff's testimony regarding the 'wrestling move' that Defendant Baker allegedly repeated five to ten times during each shift that he worked with Plaintiff." *Decision,* at 14-15.

Up to this point in the analysis, we are in complete agreement with the District Court. Suders presented compelling evidence sufficient to raise genuine issues of material fact on her claim of a sexually hostile work environment. We part company with the District Court, however, in the balance of its analysis relating to the liability of the PA State Police. Although it concluded that Suders had marshaled enough evidence to survive the motion for summary judgment, the District Court

proceeded to consider the affirmative defense set forth in *Ellerth* and *Faragher*. Ultimately, it found that the PA State Police was entitled to assert the defense and that there were no issues of fact justifying trial on the merits. Thus, the Court granted summary judgment as to Suders's Title VII claim against the PA State Police.

We believe that the District Court's analysis was fundamentally flawed for two reasons. First, even if the PA State Police could assert the affirmative defense, disputed issues of fact relating to the defense preclude summary judgment here. While the PA State Police contended that it had an effective remedial program in place to address sexual harassment claims, Suders never found the complaint form necessary to trigger an investigation. Moreover, Suders contacted Smith-Elliott twice. The first time, Suders alluded to potential problems and stated that she might need assistance. No attempt was made to follow up on Suders's initial contact. The second time, Suders contended that Smith-Elliott was entirely unhelpful, appearing insensitive at times. On this record, it is unclear whether the PA State Police exercised reasonable care to prevent or correct the sexual harassment that Suders claimed she suffered. Accordingly, the grant of summary judgment on the basis of the affirmative defense was improper.

Second, and more importantly, the Court did not consider Suders's claim of constructive discharge and whether a claim of constructive discharge would affect the availability of the affirmative defense.

B. Constructive Discharge

Suders argued that, as a result of the pervasive sexual harassment and discrimination at the McConnellsburg barracks, she had no alternative but to resign. In other words, she contended that her departure, although

voluntary in the strict sense of the word, was a constructive discharge because of the hostile work environment that she endured. To the extent that the District Court did not recognize a claim of constructive discharge, we hold that the Court erred. The allegations of constructive discharge were apparent on the face of Suders's complaint. In the very first paragraph, Suders alleged that she was "forced to suffer a termination of employment because she would not yield to sexual suggestions, innuendoes and solicitatious [*sic*] behavior." App. at 27. She also stated that "when defendants, by and through [PA State Police] operatives, on August 20, 1998, threatened plaintiff, she felt she had no choice but to resign, and did so out of fear." *Id.* at 34. The record is also replete with testimony relating to harassment, discrimination, false charges of theft, and Suders's eventual resignation. Therefore, we will address the merits of Suders's claim of constructive discharge based on the record presented in the District Court, an inquiry that should have been performed in the first instance by the trial court.

In *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887 (3d Cir.1984), we first recognized that "acts of discrimination in violation of Title VII can make working conditions so intolerable that a reasonable employee would be forced to resign." Noting that the Courts of Appeals were divided as to the findings necessary to support a constructive discharge claim, we adopted an objective standard, as opposed to a specific intent standard: "We hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine. The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *Id.* at 888. In adopting the objective standard, we held that a plaintiff-employee may

prevail on a claim of constructive discharge by establishing that "the conduct complained of would have the *foreseeable* result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." *Id.* at 887-88 (citations omitted) (emphasis added); *see also Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir.1992) (citing *Goss*).

In *Goss*, we were convinced that the objective standard had been met because (1) plaintiff, a saleswoman, was verbally harassed by her supervisor about her plans to have children; (2) after taking sick leave as a result of a miscarriage, her sales territory had been taken away and replaced with a less lucrative territory; and (3) when she objected, plaintiff was told to either accept the assignment or resign. 747 F.2d at 888.

In subsequent decisions, we have elaborated on the requirements of a constructive discharge claim. For instance, we have rejected the imposition of an "aggravating circumstances" requirement often imposed by other Courts of Appeals.[7] *Aman*, 85 F.3d at 1084

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[7]In that regard, we noted that "we cannot state as a broad proposition of law that a single non-trivial incident of discrimination can never be egregious enough to compel a reasonable person to resign. An employment discrimination plaintiff may simply face a more difficult burden of proof in establishing the employer's liability, when relying on a single discriminatory incident as a basis for arguing the occurrence of constructive discharge." *Levendos*, 860 F.2d at 1232; *see also Aman*, 85 F.3d at 1084.

When we decided the appeal in *Levendos*, at least three Courts of Appeals had articulated an aggravating circumstances requirement. *See Levendos*, 860 F.2d at 1232 n. (continued...)

(citing *Levendos*, 860 F.2d at 1232). Therefore, in *Aman*, we held that "[t]he fact that [plaintiff] had been subject to continuous discrimination during her employment could support a conclusion that she simply had had enough. No other precipitating facts were legally required." 85 F.3d at 1084.

Despite our rejection of an aggravating circumstances requirement, we have stated that a plaintiff claiming constructive discharge must demonstrate that the alleged discrimination surpasses "a threshold of 'intolerable conditions." ' *See Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 169 (3d Cir.2001); *Connors v. Chrysler Financial Corp.*, 160 F.3d 971, 976 (3d Cir.1998). In *Connors*, we noted that

> "Intolerability" is not established by showing merely that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign; presumably every resignation occurs because the employee believes that it is in his interest to resign. Rather, "[i]ntolerability ... is assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt *compelled* to resign,"-that is, whether he would have had no choice but to resign.

160 F.3d at 976 (emphasis in original) (quoting *Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir.1996)).

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[7](...continued)
9 (citing *Nolan v. Cleland*, 686 F.2d 806, 813 (9th Cir.1982); *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir.1981); *Clark v. Marsh*, 665 F.2d 1168 (D.C.Cir.1981)).

In *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159, 1161 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993), we sought to refine these requirements further by identifying several situations that may be indicative of constructive discharge: (1) a threat of discharge; (2) suggestions or encouragement of resignation; (3) a demotion or reduction of pay or benefits; (4) involuntary transfer to a less desirable position; (5) alteration of job responsibilities; (6) unsatisfactory job evaluations. Our identification in *Clowes* of situations that often accompany constructive discharge was not intended to be exhaustive; rather the situations were intended "to illustrate *some* of the factors on which plaintiffs claiming constructive discharge have relied." 991 F.2d at 1161 n. 1 (emphasis added); *see also Duffy*, 265 F.3d at 168 ("[W]e have never made the *Clowes* factors an absolute requirement for recovery.... The absence of the factors in *Clowes* is not necessarily dispositive."). Nevertheless, the situations delineated in *Clowes* have assisted courts in our Circuit over the years in identifying meritorious constructive discharge claims. *See, e.g., Duffy*, 265 F.3d at 168 ("The District Court correctly recognized that Duffy had failed to demonstrate any of the factors listed in *Clowes*.").

Furthermore, we recognized another important consideration in *Clowes* that relates to the inquiry of whether a reasonable person would have felt compelled to resign: "As other courts of appeals have noted, a reasonable employee will usually explore such alternative avenues thoroughly before coming to the conclusion that resignation is the only option." 991 F.2d at 1161 (citations omitted). We underscore that this consideration does not amount to a *quasi* exhaustion requirement: "We do not require such steps to be taken in all cases. An employee may be able to show working conditions were so intolerable that a reasonable employee would feel forced to resign without remaining on the job for the

period necessary to take those steps." *Id.* at 1162 n. 6. Therefore, it is relevant to a claim of constructive discharge whether a plaintiff explored alternative avenues to resolve the alleged discrimination, but the plaintiff's actions must be considered in light of the totality of circumstances. *Clowes* simply recognizes that, in many cases, a reasonable person will not react to minor harassment or workplace disturbances by heading straight for the exit and that, in others, the harassment or discrimination may be so severe that any reasonable person would feel compelled to walk out immediately.

Based on our existing jurisprudence, then, we reiterate that a plaintiff-employee alleging a constructive discharge in violation of Title VII must establish the convergence of two factors: (1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; in that regard, although we cannot say as a matter of law that a single incident of discrimination is insufficient to show a constructive discharge, the employee has the burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation-that is, his or her decision to resign-was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign.

By its nature, the inquiry is "a heavily fact-driven determination." *Levendos*, 860 F.2d at 1230. When an employee meets his or her burden under this test, a constructive discharge operates as the functional

equivalent of an actual termination. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir.1996), *cert. denied*, 521 U.S. 1129 (1997) ("Under the applicable law, a plaintiff who voluntarily resigned may maintain a case of constructive discharge when the employer's allegedly discriminatory conduct creates an atmosphere that is the *constructive equivalent* of a discharge.") (emphasis added) (citations omitted); *see also Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir.1987) ("When a constructive discharge is found, an employee's resignation is treated — for the purpose of establishing a prima facie case of employment discrimination — as if the employer had actually discharged the employee.").

Applying the law to the present case, it is clear that Suders has raised genuine issues of material fact relating to her claim of constructive discharge. As we noted with respect to her claim of a sexually hostile work environment, the harassment that she claimed to have endured was persistent, ongoing, and severe. Prendergast made it clear, through repeated acts of intimidation and his direct statements, that Suders was not wanted at the station. To be subjected to Baker's wrestling routine on a nightly basis, along with his and Easton's conversations of bestiality, oral sex, and genital piercing, would have been intolerable to any reasonable person. The conduct of the PA State Police officers at the McConnellsburg barracks drove Suders to draft a resignation letter.

If the harassment was limited to the type of conduct described above, we find that disputed issues of fact would have precluded summary judgment on Suders's constructive discharge claim, notwithstanding the PA State Police's argument that she failed to avail herself of an effective complaint procedure. Arguably, Suders made only one serious attempt on August 18, 1998, to resolve her problems within the remedial program established by

the PA State Police. Furthermore, the two days that she waited before resigning did not give her employer a chance to remedy the problems at the McConnellsburg barracks. Nevertheless, whether Suders's work environment was objectively intolerable and whether a reasonable person in her position would have felt compelled to resign would remain open issues.

Any shred of doubt, however, is removed when considering the events of Suders's final day on the job. Drawing all reasonable inferences in her favor, Suders presented evidence sufficient to enable a reasonable finder of fact to conclude that the officers attempted to set her up on a false charge of theft. The concealment of her test results in a set of drawers in the women's locker room, the use of theft detection powder to catch one of their own inside the station, and the excessive and humiliating treatment that Suders suffered when she was handcuffed and photographed all point to a pattern of conduct designed to find some way to terminate Suders. In that respect, the facts of this case bear a resemblance to *Levendos*, where we reversed the district court's grant of summary judgment on a claim of constructive discharge, in part, because plaintiff, a maitre d' and pastry chef, presented evidence that her employer had placed wine bottles in her locker to make it appear as if she was stealing. 860 F.2d at 1228, 1231. We also believe that this type of conduct — false charges of theft or other manufactured ploys designed to incriminate an employee — is sufficiently similar to the first and second situations identified in *Clowes*, 991 F.2d at 1161. In other words, false charges of misconduct are tantamount to threats or suggestions of discharge. Attacking someone with a false charge of theft seems a most effective way of suggesting that an employee will be fired or should leave voluntarily.

Of course, it is unclear at this stage of the litigation whether a finder of fact would ultimately conclude that

Suders had no other reasonable alternative but to resign. That is not, however, our concern in reviewing a motion for summary judgment. Based on the evidence presented, it is equally plausible that a jury would conclude that Suders suffered intolerable sexual harassment and that the officers set her up on a false theft charge. For these reasons, the District Court erred in failing to address Suders's claim of constructive discharge. We hold that Suders has raised genuine issues of material fact relating to her claim of constructive discharge that preclude the grant of summary judgment.

C. Is a Constructive Discharge a Tangible Employment Action?

Having found that a grant of summary judgment on Suders's claim of constructive discharge would have been improper, the issue remains whether the presence of the constructive discharge claim alters the balance of the District Court's judgment as to the liability of the PA State Police. Without analysis, the District Court permitted the PA State Police to assert the affirmative defense to vicarious liability and, as a result, to prevail on summary judgment. As we briefly noted at the outset of our opinion, *Ellerth* and *Faragher* hold that an employer is strictly liable to a victimized employee for the harassment or discrimination of its supervisors if the harassment or discrimination resulted in a tangible employment action. In that case, an employer is precluded from invoking the affirmative defense. If, however, the harassment or discrimination did not amount to a tangible employment action, the employer is entitled to assert the affirmative defense. It seems the District Court bypassed the critical issue in this case: whether a constructive discharge, when proved, constitutes a tangible employment action. We hold that it does.

1. *Ellerth* and *Faragher*

An understanding of the Supreme Court's decisions in *Ellerth* and *Faragher* is essential to the issues on appeal. In both cases, plaintiffs alleged that they endured near-constant sexual harassment at the hands of their supervisors. *Ellerth*, 524 U.S. at 747; *Faragher*, 524 U.S. at 780. The harassment included uninvited and offensive touching, lewd remarks, and crude propositions. Both plaintiffs also sought to hold their employers liable pursuant to Title VII for the harassment of their supervisors. Although the plaintiff in *Ellerth* had also alleged that her supervisor threatened to deny her tangible job benefits if she did not submit to his thinly-veiled demands for sexual favors, the alleged threats never materialized.[8] *Ellerth*, 524 U.S. 747-48. Therefore, despite this variance in the factual allegations, both plaintiffs stood in the same position with respect to Title VII, that is, they had properly stated claims for unlawful discrimination based on a sexually hostile work environment. *Id.* at 754 ("Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.") (citations omitted).

The issue in both cases, therefore, was "whether an employer has vicarious liability when a supervisor creates a hostile work environment...." *Id.; see also Faragher*, 524 U.S. at 780 ("This case calls for the identification of the circumstances under which an employer may be held liable under Title VII ... for the acts of a supervisory

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[8]Ellerth's allegation of a *quid pro quo* scenario was based in part on an incident in which her supervisor, while making comments about her breasts, told her to "loosen up," warning that "I could make your life very hard or very easy at Burlington." *Id.* at 748 (citations omitted).

employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination."). Before turning to its analysis, the Court noted that in the aftermath of its decision in *Meritor*, "Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees.... [And] the Courts of Appeals have adopted different approaches." *Faragher*, 524 U.S. at 785.[9] Therefore, in *Ellerth* and *Faragher*, both decided on the same day, the Court sought to delineate "a uniform and predictable standard [for vicarious liability] ... as a matter of federal law." *Ellerth*, 524 U.S. at 754.

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[9]The confusion among the Courts of Appeals was due in part to the terminology employed in *Meritor* to describe different types of Title VII sexual harassment cases. In *Meritor*, the Court distinguished cases where an employer demands sexual favors in return for job benefits from cases where sexually demeaning behavior — not necessarily constituting a demand for sexual liberties — alters the terms and conditions of employment. *Meritor*, 477 U.S. at 65; *see also Ellerth*, 524 U.S. at 752. The Court referred to the former as *quid pro quo* claims and the latter as hostile environment claims. The purpose of the distinction is simply to provide a "rough demarcation" between types of sexual harassment. *Ellerth*, 524 U.S. at 752.

The Court held that both were cognizable under Title VII, but that a plaintiff claiming a hostile work environment was required to show harassment that was severe or pervasive. *Meritor*, 477 U.S. at 67. Although the Court did not suggest that these terms should bear on the issue of vicarious liability, the categories acquired a significance of their own. Some Courts of Appeals interpreted *Meritor* to mean that vicarious liability is appropriate when a plaintiff establishes a *quid pro quo* claim. *See Ellerth*, 524 U.S. at 753 (citing cases). This development encouraged plaintiffs to state their claims as *quid pro quo* claims, when in fact, the distinction was never meant to inform the vicarious liability analysis.

In determining the scope of the vicarious liability of an employer for the sexual harassment of its supervisors, the Court turned to principles of agency law. Because the Title VII definition of "employer" includes "any agent," 42 U.S.C. § 2000e(b), the Court noted that "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles." *Ellerth*, 524 U.S. at 754. It also cautioned, however, that "common-law principles may not be transferrable in all their particulars to Title VII." *Id.* at 764 (quoting *Meritor*, 477 U.S. at 72). The appropriate starting point is the Restatement (Second) of Agency (1957) (the "Restatement"). *Meritor*, 477 U.S. at 72; *Ellerth*, 524 U.S. at 755.

The Restatement provision of direct relevance to this appeal is section 219(2),[10] which sets forth several

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[10]Before turning to § 219(2), the Court left open the possibility of a limited basis for vicarious liability in § 219(1), which states that "[a] master is subject to liability for the torts of his servants committed while acting in the *scope of their employment.*" Restatement § 219(1) (emphasis added). An action within the "scope of employment," is defined by other sections of the Restatement as one "actuated, at least in part, by a purpose to serve the [employer]." Restatement §§ 228(1)(c); *see also Ellerth*, 524 U.S. at 756-57. The Court recognized that when a supervisor commits sexual harassment, those actions generally are not actuated by a purpose to serve the employer. In fact, most employers today, it is hoped, condemn sexual harassment in the workplace, and the typical harassing supervisor acts on his or her own animus. *See id.; see also Faragher*, 524 U.S. at 793-94; *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-07 (3d Cir.1994). Nevertheless, the Court left open the possibility that "a supervisor [may] engage[ ] in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer," for instance, where an employer has a policy of discouraging women from seeking advancement. *Ellerth*, 524 U.S. at 757.

(continued...)

situations in which an employer may be vicariously liable for the torts of its employees acting solely for their own purposes:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> (a) the master intended the conduct or the consequences, or
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> (b) the master was negligent or reckless, or
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> (c) the conduct violated a non-delegable duty of the master, or
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> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was *aided in accomplishing the tort by the existence of the agency relation.*

Restatement § 219(2) (emphasis added); *see also* Restatement § 219, Comment e. As in *Ellerth* and

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[10](...continued)
We note that the record presented in Suders's appeal does not support the inference that the PA State Police officers were acting in the scope of their employment. Therefore, § 219(1) is not relevant to this appeal as a basis for imposing vicarious liability.

We leave aside other possible bases for liability that are not relevant to Suders's appeal: cases in which the position of the harasser makes him an alter ego of the employer; and cases in which the employee reasonably, but wrongly, believes that the harasser is a supervisor. *See Durham Life Ins. Co. v. Evans,* 166 F.3d 139, 152 n. 8 (3d Cir.1999).

Faragher, Suders does not allege that the PA State Police itself intended to harass her or that there is a non-delegable duty at issue. Therefore, subsections (a) and (c) of section 219(2) are not relevant to this appeal. Section 219(2)(b) might arguably apply if Suders had alleged that the PA State Police was negligent in that it "knew or should have known about" the harassment and failed to stop it. *See Ellerth,* 524 U.S. at 759. Because she conceded that she resigned only two days after making her first formal complaint to Smith-Elliott, Suders implicitly acknowledges that the PA State Police was not aware of what had transpired at the McConnellsburg barracks, thus precluding vicarious liability under subsection (b). Finally, Suders does not allege that the PA State Police officers purported to exercise authority that they did not have, and therefore, the "apparent authority" clause of section 219(2)(d) is also inapplicable here.

Thus, as in *Ellerth* and *Faragher,* vicarious liability must be premised on the second clause of section 219(2)(d), which provides for the vicarious liability of an employer for the tortious acts of an employee when the latter is "aided in accomplishing the tort by the existence of the agency relation." This has come to be known as the "aided in the agency relation standard." *Ellerth,* 524 U.S. at 759. In the context of Title VII, the Supreme Court recognized that "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here." *Faragher,* 524 U.S. at 802.

While the Court found an appropriate starting point in the aided in the agency relation standard, it also recognized an inherent definitional problem: broadly

speaking, most workplace harassment occurs because men and women are brought together as co-workers in close quarters. In that sense, all harassment is aided by the agency relationship put in place by employers. The Court cautioned that "[w]ere this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all *co-worker* harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue." *Ellerth*, 524 U.S. at 760 (emphasis added). In that regard, it is important to note the clear limitations of the aided in the agency relation standard as a basis for vicarious liability. Specifically, the Supreme Court recognized, and we reiterate here, a clear distinction between supervisors and co-workers. This recognition derives from the simple fact that, for purposes of liability, only supervisors, because of the authority vested in them by their employers and because of the rank they possess over others, may be aided by the agency relation in the commission of actionable harassment.[11]

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[11] *See Faragher*, 524 U.S. at 803. The Court noted that "[r]ecognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." *Id.*
In addition to the special relationship between employers and supervisors, harassment by a supervisor takes on different dimensions than harassment by a co-worker: "When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose 'power to supervise'-[which may be] to hire and fire, and to set work schedules and pay rates-does not disappear ... when he chooses to harass through
(continued...)

The distinction between supervisors and co-workers is a crucial limitation worth reiterating, but by design, it simply precludes vicarious liability under the aided in the agency relation standard for a category of would-be harassers, co-workers. The distinction does not fundamentally alter the breadth of § 219(2)(d) as written. Without further qualification, the aided in the agency relation standard risks holding the employer "automatically" liable for a supervisor's harassment without regard to the nature of the supervisor's conduct, a result that the Court forbade in *Meritor*, 477 U.S. at 72. *See also Faragher*, 524 U.S. at 804. Therefore, the Court found that in order to impose vicarious liability on an

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[11] (...continued)
insults and offensive gestures rather than directly with threats of firing or promises of promotion." *Id.* (citing Estrich, *Sex at Work*, 43 STAN. L.REV. 813, 854 (1991)).

At oral argument, the PA State Police contended that none of the individual officers had the requisite authority to commit a tangible employment action because they could not discharge or demote Suders. We reject this attempt to rein in the scope of a supervisor within the meaning of *Ellerth* and *Faragher*. The record in this case clearly reflected that (1) Easton was responsible for the day-to-day supervision of the McConnellsburg barracks; and (2) both Baker and Prendergast had supervisory duties with respect to "running [their] shift[s]." App. at 215. No more is required to raise a genuine issue of material fact as to their supervisory authority.

We are not persuaded, however, that the actions of Smith-Elliot amounted to actionable harassment. Her supervisory authority over Suders was not clearly established in the record below. Although her conduct is relevant, especially to the affirmative defense, we strain to see how it alone substantiates a claim under Title VII. Nevertheless, in light of our remand, these issues may be addressed on the merits.

employer under the aided in the agency relation standard, "something more" would be required. *Ellerth*, 524 U.S. at 760.[12] The Court's resolution of this question reflects an intricate balance incorporated into a complex rule of law with multiple components.

First, the Court identified a class of supervisory actions for which more than the mere existence of the agency relation is unquestionably required for the commission of the alleged harassment: "when a supervisor takes a tangible employment action against the subordinate." *Id.* When a supervisor's actions result in a tangible employment action, the employer shall be strictly liable for the actionable harassment of its supervisors, without regard to an affirmative defense. *Id.* at 765; *Faragher*, 524 U.S. at 808.

The Court's discussion of the attributes of a tangible employment action is critical to the present appeal. In broad strokes, a tangible employment action "constitutes a significant change in employment status." *Ellerth*, 524 U.S. at 761. A tangible employment action is also defined by reference to a non- exclusive list of representative workplace actions, "*such as* hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761 (emphasis added); *see also Faragher*, 524 U.S. at 790. In most cases, but not always, "a tangible employment action ... inflicts direct economic

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[12] *See also Faragher*, 524 U.S. at 797 ("The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement ..., but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view.").

harm." Finally, a tangible employment action implicates, in some meaningful way, the authority of the employer itself: "A tangible employment decision requires an official act of the enterprise, a company act. The decision *in most cases* is documented in official company records, and may be subject to review by higher level supervisors.... The supervisor *often must* obtain the imprimatur of the enterprise and use its internal processes." *Ellerth*, 524 U.S. at 762 (emphases added).

Second, when a supervisor's harassment does not amount to a tangible employment action, the Court found it unclear whether the aided in the agency relation standard should support vicarious liability. In that regard, we noted above that the risk of holding the employer "automatically" liable for the acts of its supervisors was too great. *Id.* at 763 ("[W]e are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment.")(citations omitted). Nevertheless, for actions that fall short of a tangible employment action, but would otherwise be actionable under Title VII, the Court did not give employers a free pass from liability. In cases where a supervisor's harassment does not result in a tangible employment action, the Court made available to employers an affirmative defense, an approach designed to further the well-recognized Title VII goals of encouraging anti-harassment policies and effective mechanisms for addressing employee complaints. *See id.* at 764; *Faragher*, 524 U.S. at 806.

Therefore, in both *Ellerth* and *Faragher*, the Court adopted the following holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

2. The Aftermath of *Ellerth* and *Faragher* and the Issue of Constructive Discharge in the Courts of Appeals

In light of the Supreme Court's guidance in *Ellerth* and *Faragher*, we reach the critical issue in this case: when a supervisor's harassment culminates in a constructive discharge, as Suders persuasively supported in her opposition to the motion for summary judgment, may her employer assert the affirmative defense to liability? As our analysis above demonstrates, the issue may be reduced more simply to whether a constructive discharge constitutes a tangible employment action. We recognize that constructive discharge did not appear in either the Supreme Court's discussion pertaining to what constitutes a tangible employment action or the list of representative employment actions. This absence is not dispositive, however, as a claim of constructive discharge was not before the Court in either of the two cases. Therefore, the principles underlying a tangible

employment action, together with the relevant agency and Title VII concerns, should guide our inquiry.

The PA State Police argues on appeal that a constructive discharge does not constitute a tangible employment action and that its position is supported by case law from other jurisdictions. We recognize a division among the Courts of Appeals as to this issue. A survey of the courts that have addressed the issue reveals a number of different approaches.

The PA State Police correctly notes that the Court of Appeals for the Second Circuit has held that a "constructive discharge does not constitute a 'tangible employment action,' as that term is used in *Ellerth* and *Faragher*." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). In *Caridad*, the court based its decision on three grounds. First, the court noted that "[c]o-workers, as well as supervisors can cause the constructive discharge of an employee." *Id.* Second, "unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer," *id.*, which would seem to contravene the Supreme Court's observation in *Ellerth*, that a tangible employment generally requires a "a company act." 524 U.S. at 762. Third, the Second Circuit suggested that in *Ellerth*, the Supreme Court implicitly addressed the issue of constructive discharge and that its holding does not permit the conclusion that such action constitutes a tangible employment action:

> Moreover, the facts of *Ellerth*, where the plaintiff, like Caridad, did not complain of the harassment prior to quitting her job, indicate that constructive discharge is not a tangible employment action depriving the employer of the availability of the affirmative defense to Title VII liability. Ellerth alleged that she had been

> constructively discharged as a result of sexual harassment by her supervisor ...; in remanding the case for a determination of whether the employer could make out an affirmative defense, the Supreme Court noted that 'Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor].[13] *Caridad,* 191 F.3d at 294-95 (citations omitted).

Recently, the Court of Appeals for the Sixth Circuit, in an unpublished opinion, has adopted the holding in *Caridad* that a "claim of constructive discharge is not a tangible employment action for purposes of *Faragher* and *Burlington.*" *Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 WL 924599, at *1 (6th Cir. June 26, 2000); *see also*

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[13]We believe that the particular factual circumstances in *Caridad* shed some light on the court's decision there and distinguish that case from the present. Plaintiff in that case had consulted defendant's Director of Affirmative Action. She told the Director that she was being sexually harassed, without telling him the details of any incidents. The Director responded that it would be impossible to take further action without the details of the sexual harassment to which she alluded. Even still, the Director offered to transfer plaintiff to another shift, but she declined this and the offer to investigate further.

The court underscored plaintiff's reluctance to take advantage of the remedial measures in place, noting that plaintiff "did not complain of the harassment prior to quitting her job," thus indicating that "a constructive discharge is not a tangible employment action." *Caridad,* 191 F.3d at 294. We believe that all of these probative facts as to plaintiff's failure to provide details and to cooperate with the Director are clearly relevant, but more to the issue of whether there was a constructive discharge in the first place. We do not believe that these facts should bear upon the question of whether a constructive discharge would constitute a tangible employment action.

Keaton v. State of Ohio, No. C2-00- 1248, 2002 WL 1580567, at *9 (S.D.Ohio June 3, 2002).[14] In addition, other district courts aligning themselves with the Second Circuit have rejected the notion that a constructive discharge constitutes a tangible employment action on other grounds. For instance, in *Powell v. Morris,* the court held that a constructive discharge is not a tangible employment action because if the Supreme Court had intended to include constructive discharge, it "could have easily listed 'constructive discharge' along with the other incidents as constituting a tangible employment action." 37 F.Supp.2d 1011, 1019 (S.D.Ohio 1999).

In contrast to the Second and Sixth Circuits, the Court of Appeals for the Eighth Circuit held that a constructive discharge, when proved, would constitute a tangible employment action. *See Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) ("The district court did not err in its instruction, since a constructive discharge constitutes a tangible employment action which prevents an employer from utilizing the affirmative defense.")(citations omitted); *Jackson v. Arkansas Dep't of Ed.*, 272 F.3d 1020, 1026 (8th Cir. 2001) ("If [plaintiff] was in fact constructively discharged, then the constructive discharge would constitute a tangible employment action and prevent the [defendant] from utilizing the affirmative defense."), *cert. denied,* 536 U.S. 908 (2002). The Eighth Circuit, however, did not address the rationales advanced by the Second Circuit in *Caridad.*

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[14]Several district courts have also adopted the holding in *Caridad* for substantially the same reasons advanced by the Second Circuit. *See Scott v. Ameritex Yarn,* 72 F.Supp.2d 587, 594 (D.S.C. 1999); *Desmarteau v. City of Wichita, Kansas,* 64 F.Supp.2d 1067, 1079 (D.Kan. 1999); *Alberter v. McDonald's Corp.*, 70 F.Supp.2d 1138, 1147 (D.Nev. 1999).

Among the district courts, the leading case for the position contrary to *Caridad* is *Cherry v. Menard, Inc.*, 101 F.Supp.2d 1160 (N.D.Iowa 2000). In a well-reasoned decision, the United States District Court for the Northern District of Iowa, presented a compelling counterpoint to the Second Circuit's decision in *Caridad*. In *Cherry*, the court found that "none of [the] reasons [advanced in *Caridad*] stands up to a probing scrutiny," and that "the court is not persuaded by [defendant's] argument, that a constructive discharge does not constitute a 'tangible employment action' as defined in *Ellerth/Faragher.*" *Id.* at 1171, 1176.

Other district courts have followed *Jaros* and *Cherry*. *See Vasquez v. Atrium Door & Window Co. of Arizona, Inc.*, 218 F.Supp.2d 1139, 1142 (D.Ariz. 2002) ("After careful consideration of the issue, the Court finds that a constructive discharge constitutes a tangible employment action."); *Haworth v. Romania Imported Motors, Inc.*, No. CV 00-1721, 2001 WL 34041893, at *8 (D.Or. Dec.27, 2001) ("Under the reasoning provided by the Supreme Court in *Ellerth/Faragher*, constructive discharge constitutes a tangible employment action as the Court contemplated the term."); *Taylor v. United Regional Health Care System, Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803, at *6 (N.D.Tex. Aug.14, 2001) ("[C]onstructive discharge and a failure to promote are 'tangible employment actions' for the purposes of Title VII.").

Other Courts of Appeals have noted the issue, but expressly declined to rule on it. *See Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 n. 8 (9th Cir. 2001) ("We have not yet determined whether a constructive discharge is a tangible employment action.... We do not reach this issue in this case because Kohler has waived her constructive discharge claim."); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 666-667 (7th Cir.) ("First, it

should be noted that we have yet to determine whether a constructive discharge is a tangible employment action within the meaning of *Ellerth* and *Faragher*. ... However, we need not settle that issue today, for we find that [plaintiff] did not raise a genuine issue of material fact that she was constructively discharged.") (citations omitted), *cert. denied*, 534 U.S. 1041 (2001).

3. A Constructive Discharge, When Proved, Constitutes a Tangible Employment Action within the Meaning of *Ellerth* and *Faragher*

Although we are cognizant of this wide divergence of views among the Courts of Appeals, we disagree with the PA State Police's argument that a constructive discharge is not a tangible employment action. Our decision is based on the following observations: (1) although we have not definitively ruled on the issue, our recent decisions have suggested that a constructive discharge constitutes a tangible employment action; (2) none of the grounds advanced by the *Caridad* line of cases persuades us that a constructive discharge should not be held to constitute a tangible employment action; and (3) holding an employer strictly liable for a constructive discharge resulting from the actionable harassment of its supervisors more faithfully adheres to the policy objectives set forth in *Ellerth* and *Faragher* and to our own Title VII jurisprudence.

At the outset, we note that although the present appeal marks the first time that we definitively address the issue of constructive discharge within the framework of *Ellerth* and *Faragher*, we are not writing on a blank slate. In *Cardenas v. Massey*, 269 F.3d 251, 266-67 (3d Cir. 2001), plaintiff alleged that he was subjected to a racially hostile work environment, resulting in his constructive discharge. In reversing the grant of summary judgment on plaintiff's hostile work environment claim,

we noted that "[i]f Cardenas convinces a jury that he was victimized by a hostile work environment created by [defendants], it is certainly possible that the same jury would find that the hostile environment was severe enough to have precipitated Cardenas' resignation, i.e., a constructive discharge." *Id.* We also recognized that "[t]here appears to be some disagreement on whether constructive discharge constitutes a tangible employment action." *Id.* at 267 n. 10. Nevertheless, we felt that in light of the particular facts and circumstances in *Cardenas*, the better result was to "leave this issue to the District Court in the first instance. For purposes of this discussion, we assume a constructive discharge is a tangible employment action." *Id.*

In addition, in *Durham Life*, 166 F.3d at 149 n. 5, plaintiff also alleged sexual harassment and a constructive discharge. In that case, a majority of the panel was achieved by the concurrence of two of our colleagues. In discussing the reasons for the different perspectives of the panel members, the Court noted that "[Plaintiff] was the subject of a tangible adverse employment action, the District Court found that her supervisors were responsible for her constructive discharge and the District Court returned a verdict compensating her for the damages she suffered." *Id.* Furthermore, we suggested in clear terms that a constructive discharge would constitute a tangible employment action: "In a case such as this one, where [plaintiff] was constructively discharged by her supervisors' action after their own actionable behavior, the holdings and instruction of *Ellerth* and *Faragher* are clear: the employer, Durham Life Insurance Company, is automatically liable and no affirmative defense is

available."[15] *Id.* Despite this clear suggestion, our holding in *Durham Life* was ultimately based on employment actions unrelated to the constructive discharge — that is, we found that plaintiff had met her burden at trial of demonstrating a tangible employment action based on, *inter alia*, evidence that her supervisor had (1) dismissed her secretary; (2) removed files from her office which were vital to her work; and (3) allocated a disproportionate share of less lucrative assignments to her. *Id.* at 153-54. Therefore, notwithstanding the suggestions in *Cardenas* and *Durham Life*, one court noted in April 2002, that as to the issue of whether a constructive discharge constitutes a tangible employment action, "the Third Circuit explicitly has declined to resolve this issue." *Evans v. Nine West Group, Inc.*, No. CIV. A. 00-4850, 2002 WL 550477, at *9 (E.D.Pa. Apr.15, 2002). We seek to resolve this issue today and to elaborate on the statements that we have already made as to the significance of a constructive discharge in the *Ellerth* and *Faragher* analysis.

In addition to our earlier suggestions in *Cardenas* and *Durham Life*, we are not persuaded that the grounds advanced in the *Caridad* line of cases compel the holding that a constructive discharge does not constitute a tangible employment action. We address first the argument in *Powell*, 37 F.Supp.2d at 1019, that there is some meaning in the Supreme Court's exclusion of

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[15]We also stated that "[u]nder Durham's theory, any substantial adverse action, such as a demotion in authority and pay, would not be a tangible adverse employment action if it led the affected employee to quit before the demotion took effect. This is contrary to Title VII doctrine, which recognizes a constructive discharge under such circumstances." *Durham Life*, 166 F.3d at 153.

constructive discharge from the list of representative tangible employment actions. We disagree.

The Supreme Court made it clear that it intended to provide a non-exclusive list of clear cases of tangible employment actions, on the one hand, and broader categories, on the other. The Supreme Court stated that a "tangible employment action constitutes a significant change in employment status, *such as* hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth* 524 U.S. at 761 (emphasis added). Several aspects of this definition support our conclusion that it was intended to be non-exhaustive. As other courts have noted, the use of the qualifier "such as" indicates that tangible employment actions are not limited to those that follow the qualifier. *See Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 93 (2d Cir. 2002); *Cherry*, 101 F.Supp.2d at 1175; *Vasquez*, 218 F.Supp.2d at 1142-43. In addition, we observe that the list begins with specific actions that could constitute a tangible employment action — hiring, firing, and failing to promote — and ends with broader categories that could describe many different workplace actions — reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. By employing this structural technique, the Supreme Court recognized a simple reality of harassment in the modern workplace: tangible employment actions often take the form of subtle discrimination not easily categorized as a formal discharge or demotion.

Also, for the proposition that a tangible employment action is a flexible concept, not limited to the actions mentioned in *Ellerth*, we need look no further than our recent decision in *Durham Life*. There, as described above, we determined that a tangible employment action

resulted where a supervisor (1) dismissed an employee's secretary, (2) removed her essential work files, and (3) allocated to her a disproportionate share of less lucrative assignments. *See Durham Life*, 166 F.3d at 153-54. Of course, none of these actions appear in the list set forth in *Ellerth*, which is entirely consistent with our finding that the Supreme Court intended to set forth a non-exclusive list of representative actions. *See id.* at 144 ("The concept of a tangible adverse employment action is not limited to changes in compensation, although Evans's pay was certainly affected by the actions taken against her. 'Tangible adverse employment action' includes the loss of significant job benefits or characteristics, such as the resources necessary for an employee to do his or her job....").

Next, we address the court's reasoning in *Caridad* that the Supreme Court implicitly addressed and rejected constructive discharge as falling within the ambit of a tangible employment action. The court's reasoning was based on the fact that although plaintiff in *Ellerth* had initially alleged a claim of constructive discharge, the Supreme Court concluded that "[plaintiff] has not alleged she suffered a tangible employment action at the hands of [her supervisor]." *Ellerth*, 524 U.S. at 766. Based on our review of the procedural history of the case, however, we find that the claim of constructive discharge was never before the Court when it ruled. While it is true that plaintiff initially pleaded a claim of constructive discharge, the trial judge granted summary judgment as to that claim, noting that "it can not be said that [defendant] made [plaintiff's] working conditions intolerable forcing her into an involuntary resignation." *Ellerth v. Burlington Industries, Inc.*, 912 F.Supp. 1101, 1124 (N.D.Ill. 1996). When the matter reached the Seventh Circuit, the focus of the appeal was limited to plaintiff's claims of *quid pro quo* harassment and hostile environment harassment. *See Jansen v. Packaging Corp.*

of America, 123 F.3d 490, 494 (7th Cir. 1997) (*en banc*) (consolidated with *Ellerth*).

By the time the matter reached the Supreme Court, the issues had narrowed even further: "The question presented on certiorari is whether [plaintiff] can state a claim of *quid pro quo* harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for [defendant's] alleged misconduct, rather than liability limited to its own negligence." *Ellerth*, 524 U.S. at 753. Simply put, plaintiff's claim of constructive discharge was never before the Supreme Court and, in fact, the Seventh Circuit barely addressed it. *See Cherry*, 101 F.Supp.2d at 1174. Our conclusion is supported by the fact that constructive discharge does not appear anywhere in the Supreme Court's analysis. Therefore, we agree with the court in *Cherry*, that "the *Ellerth* decision left entirely open the question of whether a constructive discharge resulting from conduct of a supervisor can constitute the sort of 'tangible employment action' that deprives an employer of the *Ellerth/Faragher* defense." *Id.* at 1175.

In addition, the court in *Caridad* held that because "[c]o-workers, as well as supervisors, can cause the constructive discharge of an employee," it should not be construed as a tangible employment action. 191 F.3d at 294. This observation is beside the point. The Supreme Court recognized that many tangible employment actions may be perpetrated by either supervisors or co- workers. After all, supervisors and co-workers alike can make obscene gestures, lewd comments, sexual propositions, or steal another employee's clients. For the sake of recognizing reasonable limits to the aided in the agency relation standard, however, the Supreme Court made the categorical distinction between co-workers and supervisors and imposed vicarious liability only with respect to the actions of the latter. Furthermore, the

Court noted that most, but not all, tangible employment actions are usually committed by supervisors. *Ellerth*, 524 U.S. at 762 ("As a *general proposition*, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.") (emphasis added). It is of no consequence that constructive discharge may be caused by a co-worker because we are only concerned here with that which is caused by a supervisor. And in that regard, our inquiry is not whether an action may be caused by a co-worker or supervisor, it is whether the supervisor's action constitutes a "significant change in employment status." *Id.* at 761.[16]

We turn to the final rationale advanced by the court in *Caridad*, the notion that, unlike termination or demotion, constructive discharge is not ratified by the employer. It is true that in a constructive discharge situation, it is the employee who ultimately decides that he or she has no alternative but to resign. In that sense, as regards the specific event which terminates the employer-employee relationship, a constructive discharge

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[16]As the court observed in *Cherry*, this argument "appears to be backwards: The panel in *Caridad* reasoned that a 'tangible employment action' must be a harm that only a supervisor can inflict, when the Supreme Court defined a 'tangible employment action' in terms of the harm it can inflict, observed that ordinarily, but not exclusively, only a supervisor can inflict such harm ..., and then concluded that the 'aided in the agency relation' standard 'will always be met when a supervisor takes a tangible employment action against a subordinate.' Consequently, this court concludes that, under the Supreme Court's definition, it is the *nature of the harm* inflicted by a supervisor — that is, 'a significant change in employment status' or 'inflict[ion] of a direct economic harm' — that determines whether the supervisor's action is a 'tangible employment action,' not whether a co-worker could also inflict such harm." 101 F.Supp.2d at 1172-73 (citations omitted).

may not bear the "imprimatur of the enterprise," *Ellerth*, 524 U.S. at 762, in the same way as a formal termination. We are not persuaded, however, that this distinction compels the conclusion that a constructive discharge is not a tangible employment action.

First, this view contravenes the fundamental principle of our jurisprudence that a constructive discharge, when proved, operates as the functional equivalent of an actual termination. *Sheridan*, 100 F.3d at 1075 (finding that a constructive discharge is the "constructive equivalent of a [formal] discharge"). This principle recognizes that when a plaintiff-employee successfully demonstrates that the work environment created by an employer was so intolerable that he or she had no choice but to resign, the constructive discharge becomes, for all intents and purposes, the act of the employer. There are sound reasons for adopting this legal construct. For instance, when a plaintiff-employee meets the stringent test of showing a constructive discharge, the direct economic harm suffered is identical to that of a formally discharged employee. *Cherry*, 101 F.Supp.2d at 1173 ("constructive discharge constitutes precisely the same sort of 'significant change in employment status' and inflicts precisely the same sort of 'economic harm' as any other 'firing.' "); *see also Vasquez*, 218 F.Supp.2d at 1142-43.

In addition, to the extent that *Caridad* suggested that only an action ratified by the employer and documented in official records qualifies as a tangible employment action, we disagree. As another panel of the Second Circuit noted: "though a tangible employment action 'in *most* cases is documented in official company records, and *may* be subject to review by higher level supervisors,' the Supreme Court did not require such conditions in all cases." *Jin*, 310 F.3d at 98 (emphases in original) (quoting *Ellerth*, 524 U.S. at 762). As we noted above, tangible employment actions defy neat categories and an attempt

to list them all would be futile. They occur within the context of each unique factual situation. Therefore, we agree that tangible employment actions are often ratified by an employer, and we should look first to official company records for relevant evidence. But by no means is a tangible employment action precluded solely because no documentation of a company act exists. *Ellerth*, 524 U.S. at 762.

In fact, in other Title VII contexts, courts have explicitly recognized that some of the most pernicious forms of workplace harassment, clearly amounting to tangible employment actions, are often not accompanied by official company acts. This is especially true in *quid pro quo* cases where a victimized employee submits to a supervisor's demands for sexual favors in return for job benefits, such as continued employment. In these cases, it is rare that a supervisor's demands for sexual liberties, and the corresponding threat of adverse consequences for failure to submit, will be documented anywhere in company records. Therefore, a rule requiring a victimized employee who submits to a supervisor's indecent demand for sexual favors to prove an official company act in order to establish a tangible employment action strains common sense. As the Second Circuit has held, the more sensible approach in the *quid pro quo* context is to recognize that, by his or her actions, a supervisor invokes the official authority of the enterprise:

> Finally, MetLife relies on a statement in *Ellerth* that "a tangible employment decision requires an official act of the enterprise, a company act." But, assuming Jin's allegations to be true, Morabito's use of his supervisory authority to require Jin's submission was, for Title VII purposes, the act of the employer. This is because Morabito brought "the official power of the enterprise to bear" on Jin by explicitly threatening to

fire her if she did not submit and then allowing her to retain her job based on her submission.

Jin, 310 F.3d at 98 (citations omitted).

This rationale is equally applicable in the context of constructive discharge. By focusing on the actions of a supervisor and on the type of injury to a plaintiff, it becomes clear that when a supervisor creates a hostile work environment so severe that an employee has no alternative but to resign, the official power of the enterprise is brought to bear on the constructive discharge.[17] In that regard, we find no sound justification for requiring more in constructive discharge cases than in *quid pro quo* cases in order to find a tangible employment action: an employee's constructive discharge is no more unilateral an act of the victimized employee and no less coerced by the employer than submission to sexual advances in a *quid pro quo* situation. Therefore, we reject any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action.

In any event, we note that, as a practical matter, a constructive discharge is often ratified by the employer. In the appeal of *Ellerth* to the Seventh Circuit, Chief Judge Posner remarked in his concurring opinion that "[t]he difficult borderline case is that of constructive termination precipitated by a threat. The termination will

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[17] *See generally* Kerri L. Bauchner. *From Pig in a Parlor to Boar in a Boardroom: Why Ellerth Isn't Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 331-32 (1999) (advocating a competing interests approach to sexual harassment cases which would give due regard to the injury suffered by a plaintiff).

look to the supervisor's superiors like a voluntary quit. But since there is *always some paperwork involved in an employee's quitting*, the higher-ups in the company will have some ability to monitor constructive discharges, and I would therefore impose *strict liability* in such cases." *Jansen*, 123 F.3d at 515 (emphases added). The present case is a perfect illustration of this proposition. While it is true that Baker's repetition of the wrestling move five to ten times per evening might not be reflected in official PA State Police records, the circumstances of the allegedly false charge of theft are quite likely to be detailed in documents. Suders was handcuffed, photographed, and detained as a suspect, events that surely leave a paper trail. At a trial on the merits, the significance of these documented events may be judged by weighing Suders's testimony against that of the PA State Police officers. Thus, the documents surrounding Suders's departure may indeed reflect the imprimatur of the PA State Police to the extent that its supervising officers were trying to force Suders to quit, and we believe that she should have the opportunity to prove that. Moreover, because a constructive discharge will necessarily involve the termination of an employment relationship, the employer will be on notice and have the opportunity to determine the cause of the separation from employment. This too may be an appropriate line of inquiry for trial.

For these reasons, we are not persuaded by any of the grounds advanced by the *Caridad* line of cases for the proposition that a constructive discharge does not constitute a tangible employment action.

Lastly, we find that placing a constructive discharge within the rubric of tangible employment actions more faithfully adheres to the Supreme Court's guidance in *Ellerth* and *Faragher* and to our Title VII jurisprudence. At the outset, we reiterate that when a plaintiff-employee

satisfies his or her burden of proving a constructive discharge, we view the resignation as the functional equivalent of an actual termination. *See Sheridan*, 100 F.3d at 1075. As noted above, we have not found any sound justifications for treating a constructive discharge differently from an actual termination in the tangible employment action analysis.

As we also noted above, a constructive discharge has, in most critical respects, the primary attributes of a tangible employment action, as defined in *Ellerth* and *Faragher*. In the same way as a formal discharge, a constructive discharge "constitutes a significant change in employment status," by ending the employer-employee relationship. *Ellerth*, 524 U.S. at 761. A constructive discharge also inflicts the same type of "direct economic harm." *Id.* at 762; *see also Cherry*, 101 F.Supp.2d at 1173; *Vasquez*, 218 F.Supp.2d at 1143.

Turning to our Title VII jurisprudence, we noted in *Andrews* that "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.... Such an objective can only be achieved if women are allowed to work without being harassed. Women who know that they will be subject to harassment will be deterred from joining the work force or accepting certain jobs."[18] 895 F.2d at 1483. We also recognized that, "[r]egrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination

[18]*See also Faragher*, 524 U.S. at 805-06 (noting that primary purpose of Title VII is not to provide redress, but rather to avoid harm). This purpose served as the basis for making an affirmative defense available to an employer in the absence of a tangible employment action.

continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms." *Aman*, 85 F.3d at 1081-82. In light of both the policies and the realities of workplace discrimination, we have always been mindful of the consequences and the intricate balance of incentives when adopting rules in the context of Title VII. *See Durham Life*, 166 F.3d at 154 (holding that requiring plaintiffs to report the first instance of discriminatory conduct "would have the perverse effect of putting a greater burden on plaintiffs who had extensive evidence of discrimination."); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 544 (1999) ("Applying the Restatement of Agency's 'scope of employment' rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs."); *Robinson v.. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (noting that the "exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC.").

In that regard, we emphasize that removing constructive discharge from the category of tangible employment actions could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment. When confronted with allegations of sexual harassment, employers have a wide range of options, including terminating the offending supervisor or stepping in and removing the victim from the hostile work environment by, for example, a transfer. But as our ever expanding Title VII caseload shows, there are instances when employers ignore these two alternatives and opt instead to either turn a blind eye or let their internal procedures run their course while the hostile work environment remains unchanged. With these realities in

mind, if we were to hold that a constructive discharge does not constitute a tangible employment action, employers would undoubtedly catch on to the availability of the affirmative defense even if the victimized employee resigns from objectively intolerable conditions at work. Under such a rule, the temptation of employers to preserve their affirmative defense would be overwhelming in many situations. Some employers might wish for an employee to quit voluntarily; others might even tacitly approve of increased harassment to achieve that result. In any event, the benefits of stepping in to remedy the hostile work environment are measurably cloudier.

These are exactly the sorts of incentives that courts should take pains to avoid. If anything, our decision should be guided by the paramount policy objectives set forth in *Ellerth* and *Faragher:* "to prevent sexual harassment from occurring ... [by] informing employees of their right to raise and how to raise the issue of harassment," and "to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." *Faragher,* 524 U.S. at 806 (quotations and citations omitted). By holding that a constructive discharge constitutes a tangible employment action, we effectively encourage employers to be watchful of sexual harassment in their workplaces and to remedy complaints at the earliest possible moment; otherwise, they risk losing the benefit of the affirmative defense should victimized employees feel compelled to resign.

Nor do we believe that our holding today discourages responsible behavior on the part of victimized employees. Because of the stringent test for proving constructive discharge, as set forth in part III.B, *supra,* it is highly unlikely that employees will walk off the job at the first sign of harassment and expect to prevail under Title VII. Because plaintiffs are expected to show intolerable conditions and reasonable responses to the alleged

harassment, the strategy of resigning and then mixing constructive discharge with Title VII claims will ultimately fail in the absence of a *genuine* constructive discharge situation.

For the reasons set forth above, we hold that a constructive discharge, when proved, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher.* With respect to her appeal, we hold that, because Suders raised genuine issues of material fact as to her claim of constructive discharge, the PA State Police is precluded from asserting the affirmative defense to liability advanced in support of its motion for summary judgment. These issues require a trial on the merits. Should Suders persuade the finder of fact that she was constructively discharged, the PA State Police shall be strictly liable for any actionable hostile environment. If Suders does not prevail on her claim of constructive discharge, the PA State Police may be entitled to invoke the affirmative defense. In any event, we will reverse the District Court's grant of summary judgment and remand for a disposition on the merits in accordance with our opinion.

IV.

In summary, we concur with the District Court insofar as it held that Suders had raised genuine issues of material fact as to her claim of a sexually hostile work environment in violation of Title VII. Nevertheless, the District Court improperly granted summary judgment in favor of the PA State Police on the basis of the affirmative defense in *Ellerth* and *Faragher.* Specifically, we hold that the District Court erred in failing to address Suders's claim of constructive discharge. On the basis of the record presented to the trial court, we hold that Suders raised genuine issues of material fact as to her claim of constructive discharge. Finally, we hold that a

constructive discharge, when proved in accordance with the requirements set forth above in part III.B, *supra*, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*. This precludes the PA State Police's assertion of the affirmative defense in its motion for summary judgment.

In closing, we are cognizant of the possibility that our decision today may raise thorny evidentiary issues in the trial courts. In part III.B, *supra*, we noted that a plaintiff alleging a constructive discharge must establish the convergence of two factors: (1) harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; and (2) the employee's decision to resign was reasonable under the circumstances. As to the second factor, whether the employee explored alternative avenues to resolve the alleged harassment may be relevant, although a failure to do so may not prove fatal to the employee's claim. Conceivably, then, it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs. These are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*.

The difficulty is that once a plaintiff proves a tangible employment action by establishing a constructive discharge, *Ellerth* and *Faragher* unequivocally hold that the employer is strictly liable for any actionable harassment without regard to the affirmative defense. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. Therefore, at the point at which a constructive discharge is proved, the considerations pertaining to the affirmative defense become irrelevant. *Durham Life*, 166 F.3d at 149

("Although Durham presents extensive evidence and argument about its antiharassment policies, we find that they are *not relevant* to this case because Evans's supervisors took *tangible adverse employment action* against her.") (emphasis added). Consequently, there is a substantial risk that the test for constructive discharge may become a back door for the introduction of evidence amounting to the assertion of the affirmative defense to liability.

In a similar context, we noted the problems inherent in such a counterfactual inquiry. Defendant in *Durham Life* argued that, even assuming plaintiff could prove a tangible employment action, the victimized employee should have reported the first instance of harassment, which would have allowed it to investigate and remedy the problem. 166 F.3d at 154. In response, we stated:

> [W]e decline to investigate whether, if Evans had complained early on, the sexual harassment policy at Durham would have prevented the tangible adverse actions that occurred afterwards. The difficulty of making such a counterfactual inquiry counsels against injecting this question into already-complex discrimination cases.... [W]ere we to allow an affirmative defense every time an employer could argue that the plaintiff had some non-tangible notice of discrimination *before* adverse action was taken against her, the *Ellerth/Faragher* distinction between cases with tangible adverse action and cases without such action would become hopelessly confused.

Id. (emphasis in original).

In the context of constructive discharge cases, however, there may be instances where District Courts have to engage in this complex inquiry. It is difficult to generalize about constructive discharge cases. The

comparative merit, quantum of proof, and factual setting will differ markedly from case to case. Discovery and trial testimony may reveal any of the following: substantial proof of constructive discharge, the absence of an effective remedial program,[19] or an otherwise effective antiharassment program that failed to address a particular plaintiff's complaints. In those cases, courts should carefully weigh the relevance of evidence relating to an employer's antiharassment program, in light of our observations in *Durham Life*.

Conversely, the evidentiary record may reveal scant support for a constructive discharge; or the evidence, while falling short of compelling, may raise genuine issues of material fact relating to the constructive discharge. In those cases, some evidence regarding an employer's antiharassment program or an employee's response to the alleged harassment may be admissible for the limited purpose of determining whether a constructive discharge has occurred.

In the final analysis, we rely on the wisdom and expertise of trial judges to exercise their gatekeeping authority when assessing whether all, some, or none of the evidence relating to employers' antiharassment programs and to employees' exploration of alternative

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[19] *See Faragher*, 524 U.S. at 808 ("While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Simpson.... Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisor's harassing conduct.").

avenues warrants introduction at trial. Of course, there may be instances when some evidence of this kind is admitted, yet the plaintiff ultimately prevails on a constructive discharge claim. In these cases, instructions to the jury regarding the admissibility of such evidence for limited purposes may cure any harm caused by its earlier introduction. Clear and concise jury verdict forms may also diminish the risk of confusion. Although these are complex issues, they are similar in kind to admissibility questions that trial judges are asked to decide on a regular basis.

For the reasons set forth above, we will reverse the judgment of the District Court as to Suders's Title VII claim against the PA State Police, and we will remand the case for a disposition of that claim on the merits consistent with our opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY DREW SUDERS, Plaintiff	:	
v.	:	CIVIL NO. 1:CV-00-1655
ERIC D. EASTON; WILLIAM D. BAKER; ERIC B. PRENDERGAST; VIRGINIA SMITH ELLIOTT; and THE PENNSYLVANIA STATE POLICE, Defendants	:	

MEMORANDUM

Before the court is Defendants' motion for summary judgment. The parties have briefed the issues, and the motion is ripe for disposition.

I. Background

The following facts are undisputed except where noted:[1] Plaintiff, Nancy Suders, became employed by

[1]Plaintiff's brief in opposition to Defendants' motion for summary judgment contains various facts which are not included in Plaintiff's Counterstatement of Disputed Material Facts. Furthermore, the additional facts included in Plaintiff's opposition brief do not contain any citations to the record. Accordingly, the court will not take such facts into consideration, and will only rely upon facts for which Plaintiff (continued...)

Defendant the Pennsylvania State Police ("PSP") on March 23, 1998 as a police communications operator ("PCO"). During all times relevant to the instant litigation, the following Defendants were employed by the PSP at the McConnellsburg, Pennsylvania barracks of the PSP: (1) Defendant Eric Easton was employed as a sergeant and station commander: (2)Defendant Eric Prendergrast was employed as a corporal; (3) Defendant William Baker was employed as a patrol corporal; and (4) Defendant Virginia Smith-Elliot was employed as the equal opportunity officer for the PSP.[2]

On Plaintiff's first day of work another PCO, Jody Lancaster, explained to Plaintiff and two other new trainees the workings of the communications office. Defendants contend that Lancaster showed Plaintiff the women's locker room and pointed out two dressers, explaining that two of the drawers were Lancaster's and assigning separate drawers to Plaintiff and one of the other trainees. (Def. Stat. Mat. Facts "Def. Facts" at¶ 7.) However, Plaintiff avers that no one ever pointed out what drawers in the dressing room belonged to each individual employee. (Pl. Responsive Facts at ¶ 7.) When Plaintiff first began working, she had another PCO working with her. (Def. Ex. G, "Pl. Dep." at 42.) Then, in June 1998, Plaintiff attended training for her position at the police academy for two weeks. Plaintiff testified, however, that when she had questions at work, other employees would not help her "any more than they had to." (*Id.* at 69.)

[1](...continued)
or Defendants' have provided "references to the parts of the record that support the statement," as required by Local Rule 56.1.

[2]Hereinafter, where possible Defendants Easton, Baker, Prendergrast, and Smith-Elliot will be referred to collectively as the "individual Defendants."

Plaintiff testified that she began to experience "harassment" one to two weeks after she began her job. (*Id.* at 42.) With regard to Defendant Easton, Plaintiff alleges before Plaintiff began her job, Easton told Plaintiff that he had some concerns about her and that anything Plaintiff would say about Easton would be her word against his. (*Id.* at 48.) Comments that Plaintiff found offensive included Easton saying "it is awful getting old, isn't it, Nancy" and similar statements that were "constant." (*Id.* at 43.) Plaintiff was also offended by a comment from Easton that "a 25-year-old could catch on faster than [Plaintiff] could." (*Id.* at 44.) Easton contends that this statement was made in Plaintiff's defense to explain why she was having trouble catching on to the job.[3]

Plaintiff further avers that every time she would go into Easton's office "he would bring up this business about people having sex with animals. He would say, you know people have sex with animals...that's all the man wanted to talk about." (*Id.* at 46, 50.) Plaintiff was offended when Defendant Easton, wearing spandex shorts, "would sit down in the chair [near Plaintiff's work space], put his hands behind his head and spread his legs apart." (*Id.* at 46-47.) Plaintiff also testified that Easton told Defendant Prendergrast that people should teach their daughters how to "do a good blow job." (*Id.* at 49.) Easton would leer at Plaintiff when she went into his office, and she was afraid of him. (*Id.* at 50.) Plaintiff alleges that Easton told her that he would do anything for PCO Lancaster, including take a person out back and shoot them in the head. (*Id.* at 51-52.) Plaintiff testified that Easton never made any sexual advances, but that

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[3]Specifically, one of Plaintiff's co-workers had prior experience in the field, and the other had just graduated from college and was very familiar with computers.

she "didn't know what he was going to do" so she stayed away from him. (*Id.* at 51.) Plaintiff also testified that on one occasion, Easton told Plaintiff that he had dealt with his wife's paranoia for 20 years and didn't want to deal with Plaintiff's, and he told Plaintiff that his wife had small breasts. (*Id.* at 123.)

Plaintiff also had the impression that Defendant Easton "had a reputation for liking young girls." (*Id.* at 79.) Plaintiff based this on her observations of him sharing his jacket with a young female PCO, seeing him in a back hallway "pushed up against [the same individual]. His face was only inches maybe from hers." (*Id.* at 79-80.) She also observed him putting his arms around a woman in her twenties, pulling her tightly to him, and "wiggling around" with her in that position. (*Id.* at 81.)

Turning to Defendant Baker, Plaintiff testified that soon after she started sitting at the communications desk by herself, Defendant Baker would do a wrestling move "where he would cross his hands, grab hold of his private parts and yell suck it. The man did this, and he would beat on it. He would beat his hands on his crotch and yell suck it. He would ask me to do this garbage." (*Id.* at 53.) According to Plaintiff, Baker would do this five to ten times per night when she was working. Plaintiff also states that one night, when Plaintiff told Baker that she did not think he should be doing the move, Baker climbed on a chair approximately five feet from the communications desk and simulated the move again. (*Id.* at 53-54.) Plaintiff testified that "all [Baker] wanted to do was play with his crotch." (*Id.* at 57.) Plaintiff also claims that Baker "would rub his rear end and say, I have a nice ass, don't I?" (*Id.* at 59.) Plaintiff also found offensive a picture near Baker's desk of a wrestler making the same move.

Another incident involving Baker occurred when he came to work one day claiming that his back hurt, and a fellow male employee said things to him in front of Plaintiff such as "can I rub the hair on your legs?" and "can I rub your back?" (*Id.* at 61.) Then Baker went and rubbed the other employee's back and said "amorous things." (*Id.*) Baker then said to Plaintiff "what's the matter, don't you like gays?" (*Id.*) Baker also commented to Plaintiff that he was going to get his penis pierced and that his wife was going to get her nipple pierced. (*Id.* at 63.) Finally, Baker would refer to Plaintiff as "momma."

Plaintiff did tell Baker that she was offended by the wrestling move and the back rubs, but when asked why she did not tell anyone else about the events she responded that "there was no one on that station that I could go to. I had a sergeant there who was talking about abusing children and bestiality. There was no way I was going to be able to tell him. There was nobody." (*Id.* at 65.)

Regarding Defendant Pendergrast, Plaintiff contends that he would verbally "pound" her day after day, referring to Plaintiff as a liar and telling her that the village idiot could do her job. (*Id.* at 67.) Plaintiff also testified that Pendergrast would wear black gloves and hit the side of the communication desk across from Plaintiff, and that this was intimidating. (*Id.* at 73.) Plaintiff contends that Pendergrast was proud to be compared to a "storm trooper" or a "Nazi." (*Id.*)

At some point during Plaintiff's employment, an accident file turned up missing. Defendant Baker asked Plaintiff if she had the file and she responded negatively. Plaintiff testifies that Defendant Pendergrast accused her of taking the file home. (*Id.* at 76.)

Plaintiff complained about the incidents at work to Mikael Fix, a Republican Party Chairman who helped Plaintiff obtain her position. When Plaintiff was in training in June 1998, Virginia Smith-Elliot taught a class on sexual harassment. Plaintiff approached Smith-Elliot and told her that she might need some help, and Smith-Elliot gave Plaintiff her phone number. (*Id.* at 93.) Plaintiff did not contact Smith-Elliot until August 18, 1998, two days before she resigned from her position. Plaintiff contacted Smith-Elliot by phone and told her that she was afraid and that she was being harassed. (*Id.* at 94.) Plaintiff says that Smith-Elliot told her to fill out a form that Plaintiff was unsure how to obtain, to which Smith-Elliott responded "I'll see what I can do." (*Id.* at 95.) Plaintiff states that she looked through manuals to see what she could do about the harassment, but never found a form to fill out, and that she felt as though Defendant Pendergrast was watching her all the time. Plaintiff says that Smith-Elliot did not agree to send her the form or even ask for her address. When asked about her contact with Plaintiff, Smith-Elliot recalls complaints of age and political affiliation discrimination, but not complaints of sex discrimination. Plaintiff states that she had seen the PSP's sexual harassment policy, and Smith-Elliot testified that she believes it was posted at the McConnellsburg barracks and that it went out per capita to each employee. (Smith-Elliot Dep. at 42.)

Plaintiff received a supervisor's notation on July 22, 1998 because she failed to complete an assignment that had been given to her on May 12, 1998. On July 26, 1998, Plaintiff was counseled because she put a message about a criminal escapee from Ohio in the crime corporal's bin, but did not disseminate the information to patrols. Plaintiff states that someone in the office told her not to worry about the message because the escapee was from Ohio. (*Id.* at 143.) Defendants Prendergrast and Easton testified that Plaintiff was disorganized, that she

became overwhelmed by her job responsibilities easily, and she did not handle constructive criticism well. (Prendergrast Dep. at 10; Easton Dep. at 39, 45-46, 66.)

There was an employment related exam that Plaintiff had to take three times. Defendants contend that Plaintiff failed the exam, but Plaintiff believed that her test results were hidden from her and that she was lied to about them. (Pl. Dep. at 155-60.) The test results were kept in a file drawer in the dresser kept by Defendant Lancaster in the ladies locker room. Plaintiff had gotten into the drawer on two occasions prior to the night that she resigned. When papers were missing from the drawer, a file was dusted with theft detection powder and placed back into the drawer. On August 20, 1998, Plaintiff again went through papers in the drawer, and when she returned to the communications area, she had blue on her hands. Plaintiff contends that she had a right to be in the drawer because "[s]he had found some of her personal papers in there, and the drawer was not assigned to anyone person." (Pl. Counter Stat. Facts at ¶ 51.)

Defendant Easton says that Plaintiff was told to take the rest of the evening off after questioning her about the blue on her hands. (Easton Dep. at 69.) Plaintiff contends that she was "abused, threatened and held against her will." (Pl. Counter Stat. Facts at ¶ 53.) Specifically, Plaintiff testified as follows to the events of that evening:

> Baker was there. He said — he said, that's bad getting into somebody's stuff.... I said, I didn't get into anything in here.... I told Baker — I said, well, I'm resigning. I couldn't — you know, I think at that point I said — and he said — I said, I'm resigning.... And he said, well, you can't leave. And I said, well, I'm going to leave. I said, I'm resigning, I'm leaving. I couldn't stand — take it anymore. And he said to me — he

> said, well, you're not leaving. He said, you're a suspect.

(Pl. Dep. at 102.) Plaintiff turned in a resignation letter that she had been carrying with her.

Plaintiff filed the instant action on September 18, 2000. Plaintiff seeks redress for discrimination based on age, political affiliation and sex. Specifically, Plaintiff contends that she was "forced to endure an insulting, humiliating work environment, and ... forced to suffer a termination of employment because she would not yield to sexual suggestions, innuendoes, and solicitous behavior." (Compl. at ¶ 1.) Plaintiff states her claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000 *et seq.*; and the Pennsylvania Human Relations Act ["PHRA"), 43 Pa. Cons. Stat. Ann. § 951 *et seq.*

II. Legal Standard: Motion for Summary Judgment

Federal Rule of Civil Procedure 56 provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis which would allow a reasonable fact-finder to return a verdict for the non-moving party. *Id.* at 249. The court must resolve all doubts as to the existence of a genuine issue of material fact in favor of the non-

moving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985).

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in her complaint; instead, she must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, and designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)(internal quotations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will beard the burden at trial." *Id.*

III. Discussion

A. Individual Liability under Title VII and the ADEA[4]

The individual Defendants move for summary judgment on all of Plaintiff's Title VII claims arguing that individuals cannot be held liable under Title VII. The individual Defendants also note that ADEA claims are also barred against individual defendants.

Title VII provides that it is unlawful for an employer to discriminate against an individual on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). The Third Circuit has specifically held that "Congress did not intend to hold individual

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[4]The court here notes that Title VII does not prohibit discrimination based on political affiliation. Therefore, the court will not address the merits of Plaintiff's political affiliation discrimination claims.

employees liable under Title VII." *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 184 (3d Cir. 1977)(citing *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996); *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996)).

In response, Plaintiff contends that the definition of "employer" contained in Title VII includes "any agent" of the employer, 42 U.S.C. § 2000e-(b), and suggests that this language allows for suits against the individual Defendants. The court is not persuaded by Plaintiff's argument. Prior to the Third Circuit's decisions in *Sheridan, Kachmar,* and *Dici,* at least one district court in this circuit was presented with an argument that individuals could be held liable under Title VII based on the inclusion of the term "any agent" in the definition of employer. *See Caplan v. Fellheimer Eichman Braverman & Kaskey*, 882 F. Supp. 1529, 1523 (E.D. Pa. 1995). At that time the circuits were split on whether an individual could be held liable under Title VII as were the district courts in this circuit. *Id.* at 1531.

Relying on Fifth and Ninth Circuit precedent, the court in *Caplan* held that "the references to 'agents' in the definition of employer [in Title VII] is simply to incorporate respondeat superior liability into Title VII." *Id.* at 1532 (citing *Grant v. Lone Star Co.*, 21 F.3d 649, 651 (5th Cir. 1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993)("There is no reason to stretch the liability of individual employees beyond the respondeat superior principle intended by Congress.")). In deciding *Sheridan*, the Third Circuit aligned itself with the circuits that held against individual liability under Title VII, and did not find that the reference to "agents" in Title VII allowed for individual liability. Thus, the court will grant summary judgment in favor of the individual Defendants on Plaintiff's Title VII claims.

The ADEA prohibits discrimination against employees based on their age, and it allows for suits against employers for such discrimination. 29 U.S.C. § 623(a). Moreover, as in Title VII cases, federal courts have refused to allow individual liability under the ADEA. *See, e.g., Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 685 (5th Cir. 2001)("the ADEA 'provides no basis for individual liability for supervisory employees.'" (citing *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996)); *Hiler v. Brown*, 177 F.3d 542, 546 (6th Cir. 1999) ("[N]umerous courts...have held that supervisors, sued in their individual capacities, are not included within the statutory definition of 'employer' under Title VII and its sister civil rights statutes, and accordingly cannot be held personally liable for discrimination."); *Miller v. Maxwell Intl, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993)(holding that individuals not liable under Title VII of the ADEA). Therefore, the court will also grant summary judgment in the individual Defendants' favor on Plaintiff's ADEA claims.

B. Eleventh Amendment Immunity

The court will grant summary judgment in favor of the PSP on Plaintiff's ADEA and PHRA claims because Pennsylvania enjoys Eleventh Amendment immunity. The Eleventh Amendment of the United States Constitution bars suits against a state or state agency in federal court by citizens of any state. *See, e.g., Atascadaro State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984).

Exceptions to Eleventh Amendment immunity exist only where a Plaintiff alleges an on-going violation of federal rights and seeks prospective relief, or where the state consents to suit in federal court. *See Ex Parte*

Young, 209 U.S. 123, 159 (1908); *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981). Here Plaintiff seeks redress for alleged wrongs that occurred in the past, thus the first exception to Eleventh Amendment immunity does not apply. Moreover, Pennsylvania has not waived Eleventh Amendment immunity. *See Laskaris*, 661 F.2d at 25 (recognizing that Pennsylvania has "specifically withheld consent" to suit in federal court under 42 Pa. Cons. Stat. Ann. § 8521(b)).

Plaintiff argues that the ADEA defines employer as "a state or political subdivision of a State and any agency or instrument of either." 290 U.S.C. 690(b). However, the Supreme Court specifically held in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) that "in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals." *Id.* at 91. Thus, Plaintiff cannot assert an ADEA claim against a state agency, and the court will grant summary judgment in favor of the PSP on Plaintiff's ADEA claim. Furthermore, Eleventh Amendment immunity extends to claims premised on state law causes of action. *See Pennhurst*, 405 U.S. at 105. Therefore, the court will also dismiss Plaintiff's PHRA claims against the PSP.

Finally, with regard to Plaintiff's PHRA claims, Defendants contend that the Eleventh Amendment bars the claims against both the PSP and the individual Defendants because it bars claims against state officials who are sued for actions taken within the course of their employment. Plaintiff has failed to respond to Defendants' arguments regarding the application of the Eleventh Amendment to Plaintiff's PHRA claims.[5] Thus, the court

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[5]Plaintiff does caption a section of her opposition brief "The PHRA and the 11th Amendment." (Pl. Br. in Opp. Mot. For (continued...)

will grant Defendant's motion for summary judgment on Plaintiff's PHRA claims against the individual Defendants. *See Mueller v. CBS*, No. 99-CV-1310, 2001 WL 528988, at *4(W.D. Pa. Jan. 31, 2001)(holding that the court will not do the lawyers' work for them and a lawyer who fails to press a point forfeits the point).

C. Title VII Claims against the Pennsylvania State Police

1. Hostile Work Environment

In order to establish a claim for employment discrimination due to an intimidating or offensive work environment, "a plaintiff must establish 'by the totality of the circumstances, the existence of a hostile or abusive environment which is severe enough to affect the psychological stability of a minority employee.'" *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) *(quoting Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1053, 1510 (11th Cir. 1989)). Specifically, a plaintiff must show: (1) that she suffered intentional discrimination because of her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected her; (4) the discrimination would detrimentally affect a reasonable person of the same sex in the same position; and (5) the existence of respondeat superior liability. *Kunin v. Sears Robuck and Co.*, 175 F.3d 289, 293 (3d Cir. 1999)(describing the requirements for sexual harassment).

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[5](...continued)
Summ. Jud. At 7.) However, the substance of this subsection is two sentences asserting supplemental jurisdiction pursuant to 28 U.S.C. § 1367. These two sentences do not deserve to even be considered as responsive to Defendant's substantive arguments.

The PSP argues that the first prong, discrimination based on sex, is not met here because "the comments and actions allegedly done in plaintiff's presence....were generally not directed toward her." (Defs. Br. In Supp. Mot. Summ. Jud. at 6.) However, the Third Circuit has held that a hostile work environment can arise from the frequent use of insulting and derogatory language relating to women. *See Andrews*, 895 F.2d at 1485-86 (quoting *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988)). Conduct that may be relevant to the inquiry includes name calling, pornography, and displaying sexual objects on desks. *See, e.g., Andrews*, 895 F.2d at 1486. Thus, the court cannot say as a matter of law that the comments and actions must be directed at Plaintiff in order to be discrimination based on sex.

The second, third, and fourth elements of a hostile environment claim, pervasiveness, subjective offensiveness, and objective offensiveness, are interrelated. It is well-settled that "isolated or single incidents of harassment are insufficient to constitute a hostile environment." *Rush v. Scott Speciality Gases, Inc.*, 113 F.3d 476, 482 (3d Cir. 1997). Instead, a defendant's conduct must be objectively offensive to the extent that it alters the conditions of employment for the victim in order to be actionable under Title VII. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998); *Farragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998). In determining whether a work environment is objectively hostile, courts are not to examine the scenario on an incident-by-incident basis, but instead must consider the totality of the circumstances. *Andrews*, 895 F.2d at 1485; *Stair v. Lehigh Valley Carpenters Local Union No. 600*, 813 F. Supp. 1116, 1119 (E.D. Pa. 1993). Relevant factors may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance; nonetheless, no single

factor is either required or determinative. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

Viewing the evidence in the light most favorable to Plaintiff, the court finds that there was enough conduct in the instant action to raise an issue of fact that the atmosphere was sufficiently hostile to offend a reasonable person in Plaintiff's position. Most persuasive is Plaintiff's testimony regarding the "wrestling move" that Defendant Baker allegedly repeated five to ten times during each shift that he worked with Plaintiff. Plaintiff testified that Baker "would cross his hands, grab hold of his private parts and yell suck it. The man did this, and he would beat on it. He would beat his hands on his crotch and yell suck it. He would ask me to do this garbage." (Pl. Dept. At 53). The fact that one evening when Plaintiff complained about the move, Baker climbed on a chair approximately five feet from her and simulated the move again indicates that he was relentless even knowing that it was offensive to Plaintiff. (*Id.* at 53-54.) Plaintiff also testified that Baker "would rub his rear end and say, I have a nice ass, don't I?" (*Id* . at 59). Adding to Plaintiff's claims are comments by Defendant Easton that if he had a daughter he would teach her to give "blow jobs"; repeated discussions about sex with animals; and statements about his wife's breast size. (*Id.* At 46-52, 123.) While these events standing alone might not lead to an objectively hostile work environment, viewed in their totality, a reasonable person in Plaintiff's position could find that there existed a hostile work environment.

Regarding the subjective element of a hostile environment claim, Defendants aver that Plaintiff did not suffer any identifiable ill consequences and that the alleged discriminatory conduct did not result in an inability to do her job. (Def. Br. in Supp. Mot. For Summ. Jud. at 9.) The court finds this unpersuasive as Plaintiff has testified that the conduct was offensive to her, that

on at least one occasion she did not go into work because of it, and that she felt compelled to write a letter of resignation. Thus, the court finds that the subjective test is met.

Finally, addressing the issue of vicarious liability, Defendants contend that liability only exists where an employer knew or should have known about the harassment and failed to respond. (*Id.* at 10 (citing *Meritor*, 477 U.S. at 71).) Defendants argue that there is no way that the PSP had actual notice of the allegedly discriminatory conduct prior to Plaintiff contacting Defendant Smith-Elliot two days before she resigned. Defendants further contend that Plaintiff did not avail herself of the procedures in place to report the alleged harassment, and that Plaintiff cannot maintain constructive knowledge on the part of the PSP.

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court addressed the scope of employer liability for hostile work environments. The Court in *Faragher* adopted the following rule:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. At 777-78 (citation omitted).

The court went on to discuss the relevance of employers having antiharassment policies in place:

> While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Id. at 778.

In the case *sub judice*, Defendants contend that the PSP's sexual harassment policy was located in the McConnellsburg barracks in the Administrative Regulations manuals, that the policy went out to each employee, and that it was posted on the bulletin boards in the McConnellsburg barracks. Smith-Elliot's testimony was as follows:

> Q: Is the sexual harassment policy posted?
>
> A: It has been.
>
> Q: In the barracks?
>
> A: Yes.

> Q: Do employees sign for the sexual harassment policy; basically sign that they read it?
>
> A: If I recall correctly, during the time that I was there there were some changes made to the sexual harassment policy. Like I said I believe that it went out per capita to each employee, but also that it was supposed to be posted on bulletin boards.
>
> And what they do is they have just a check-off list with everyone's name from the station on that list. Then as you read it, you're supposed to check off that you did read the policy.

(Smith-Elliot Dep. at 42.) Defendants further aver that Plaintiff was aware of the sexual harassment policy, that she probably received it during training, and that she found the policy in the Administrative Regulations manual. (Pl. Dep. at 82.)

The PSP's sexual harassment policy includes in the definition of sexual harassment "Making suggestive or provocative gesture, e.g., leering, staring, inappropriate gestures, comments, jokes or stories of a sexual nature." (Pl. Dep. Ex. 4, "Harassment Policy" at 2 ¶ C.3.) The policy further provides that "[a]ny person who believes they have been sexually harassed shall contact their immediate supervisor or the Affirmative Action Office." (*Id.* at 3¶ A.)

In the instant action, it is undisputed that Plaintiff's alleged harassers were supervisors, thus the court cannot hold that Plaintiff acted unreasonably by failing to bring her complaints to these individuals pursuant to the PSP's sexual harassment policy. However, Plaintiff also failed to contact the Affirmative Action Office as required by the sexual harassment policy. Plaintiff did approach Smith-Elliot in June 1998 during training, and Smith-Elliot gave

Plaintiff a phone number to call regarding any problems that she was having. (Pl. Dep. at 93.) However, Plaintiff chose not to contact the Affirmative Action office during the interim period when the majority of the allegedly harassing behavior took place. Plaintiff finally did contact Smith-Elliot on August 28, 1998, however, this was only two days before she resigned. Smith-Elliot told Plaintiff to fill out a complaint form, located in the Administrative Regulation manual. However, Plaintiff resigned from her employment two days later, and the PSP was never given the opportunity to respond to any complaints of sexual harassment. The court finds as a matter of law that Plaintiff unreasonably failed to avail herself of the PSP's internal procedures for reporting any harassment. This is especially true as Plaintiff had personal contact with the Affirmative Action officer early in her employment, but failed to pursue this avenue of complaint.

As Plaintiff has failed to meet the fifth element of a claim for hostile work environment, e.g., respondeat superior liability, the court will grant Defendants' motion for summary judgment on this issue.

D. Retaliation.

Plaintiff's complaint also states that she was the victim of retaliation. However, Plaintiff has failed to establish any element necessary for a retaliation claim. Title VII prohibits an employer from "discriminat[ing] against an[]...employee[]...because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000(e)-3(a). To establish a *prima facie* claim of Title VII retaliation, a plaintiff must show: (1) that she engaged in protected activity; (2) that the employer took adverse action against her; and (3) that a causal link exists between the protected activity and

the employer's adverse action. *See Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir. 1997).

Plaintiff in the instant action has failed to allege any protected activity that she engaged in. Plaintiff did not file her PHRA claim until after she resigned. Furthermore, there is no adverse employment action indicated in any part of the record. Plaintiff argues that she was retaliated against for reporting the harassing conduct to her state Senator, and that she was "finally forced into a no win resignation." (Pl. Br. in Opp. Mot. Dis. at 5.) Speaking to a state Senator does not fall within the activities protect by Title VII which include testifying, assisting, or participating in an investigation, proceeding, or hearing of a Title VII violation. Finally, even if Plaintiff's complaint to her Senator did fall within the realm of protected activity, Plaintiff cannot show an adverse employment action to satisfy the second element of the prima facie retaliation case. Plaintiff acknowledges that she had written her letter of resignation and was carrying it around in her purse when she turned it into her supervisors. There is no evidence of record that she was forced to do this. In fact, she was told only to take the rest of the evening off on the night that she resigned. Finally, even if Plaintiff had been forced to resign, she has failed to raise even an issue of fact as to a causal connection between contacting her state Senator and her resignation. Therefore, the court will also grant summary judgment in favor of Defendants on Plaintiff's retaliation claim.

IV. Conclusion

In accordance with the foregoing, the court will grant summary judgment in favor of Defendants on all counts of Plaintiff' s complaint. An appropriate order will issue.

/s/
SYLVIA H. RAMBO
United States District Judge

August 16, 2001

Supreme Court, U.S.
FILED
OCT 14 2003
OFFICE OF THE CLERK

NO. 03-95

IN THE

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA STATE POLICE,

Petitioner

v.

NANCY DREW SUDERS

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

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RESPONDENTS BRIEF IN OPPOSITION

DON BAILEY, ESQUIRE
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QUESTIONS PRESENTED

When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the affirmative defense recognized in *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)?

PARTIES TO THE PROCEEDING

The petitioner is the Pennsylvania State Police, an agency of the Commonwealth of Pennsylvania.
The respondent is Nancy Drew Suders.

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STATEMENT OF THE CASE

Nancy Suders is a wonderful woman. A local Republican Committee person, Nancy worked for the Sheriff as his Assistant in rural Fulton County, Pennsylvania. A devoted wife and mother, and a recent grandmother, Nancy was encouraged by her County Chairman to apply for an entry level position at the local Pennsylvania State Police (PSP) barracks. She agreed, primarily because she would get a substantial pay increase, and because she was extremely well qualified for the job having worked at a similar job for years. She was told she needed the recommendations of her state senator, Robert Jubalier, an outstanding public official with an impressive record of public leadership and constituent service. Nancy also had the recommendation of the Governors Office having worked in the campaign of then Governor Tom Ridge as an enthusiastic party loyalist. No political hack, Nancy was extremely well qualified and she enjoyed the enthusiastic support of all who knew her. She was, and is, a decent, honest citizen, and, now back in the Fulton County Sheriff's Office as a deputy, she continues as an exemplary public employee.

As soon as Nancy begun working at the PSP barracks she was under assault. She was subjected to some of the most egregious misconduct imaginable in a sexual harassment case. Virtually all of her supervisors participated in abusing her. She had no one to go to. She was subjected to filthy, unwelcome jokes, one of her supervisors would roll up to her, as she worked, in his office chair, wearing spandex shorts, and lean back, putting his hands behind his head, while thrusting his legs forward which he would spread

apart. The obvious invitation was to engage in oral sex. Another of her supervisors was enamored of TV Wrestling. He would periodically jump up, and, crossing his arms stiffly in front of him, grasp his privates in his hands, and scream "suck it". Another supervisor fancied himself a Nazi Storm Trooper look alike, of which he was proud. His specialty was treating Nancy as if he were a dictator – being authoritative to intimidate Nancy Suders and frighten her. Nancy began to look for help. She had no one to go to at her barracks work site, no one to talk to. Consequently, she contacted the Pennsylvania State Police Department Affirmative Action/Discrimination Officer Major Virginia Smith Elliot. Elliot was not only insensitive; she was antithetical to her appointed duties and to Nancy's rights and interests. She not only ignored Nancy's overt pleas for help she wouldn't even fax her a form she told Nancy was needed, even after Nancy told her she could find no form anywhere at the Barracks. Smith- Elliot did not merely avoid Nancy. She never asked a question, followed up, or let Nancy make even an oral report. Merely offering to fax Nancy the supposedly needed form would have helped, but Smith Elliott couldn't be bothered to do that, even though it was the second time Nancy Suders told her she needed help.

While the harassment went on, Nancy Suders also applied to take a test, on her own initiative that would have made her eligible for another job at a larger Barracks, which, although a long drive away, would have meant more money. Most important it would have meant freedom from her abusers. It is important to note that two other woman worked at the Barracks. Young and attractive they were personally

close to the supervisors. They had been chosen by the supervisors for their jobs, and one, the one with the most seniority, was seen in the embrace of Mr. Easton by Nancy personally when she arrive for her shift one evening. In short, the supervisors had other people whom they
wanted to put in Nancy's job, and they had other people for the job Nancy was applying for. Lastly, Easton was unhappy with Nancy because she advised him she had no "pull" and could not help his son get a job that Easton wanted. That had occurred early on when Nancy, who had been recruited for the position by her County Chairman had demonstrated recommendations that apparently impressed Easton, who erroneously thought Nancy was a person who had great political influence, which she did not.

When Nancy asked if any word had come back on her application (she had taken a test that went with the application) she was put off by the supervisors. She then realized something harmful to her was going on and she became even more fearful.

While at work, she went back to use the ladies restroom. She noticed one of the drawers ajar on a dresser that was in the room (along with a bed). As she glanced down she also saw what appeared to be a manila envelope. She opened the drawer and saw the envelope her job application was in, along with lingerie and women's bikini underwear and lace bras. Nancy removed her application and took it to copy it.

As it was, she could not return it immediately. When she did, she put it in the drawer and turned to use the commode. Later, as she washed her hands they turned blue. Her supervisors had set her up putting "theft powder" all over the bathroom. When in contact

with moisture it turns a bright blue. They even put it on the toilet seat.

Her supervisors held Nancy against her will at the Barracks. They threatened her with arrest and criminal charges. For days, after looking everywhere for help, Nancy had carried around a letter of resignation in her purse because she couldn't take the harassment, hoping to get another job elsewhere. But her PSP supervisors had lied to her about her test and application. Nancy insisted she be freed, she was alone and frightened, so she gave her inquisitors to take the resignation letter. They let her go.

Nancy Suders later filed suit. The District Court found that Nancy Suders failed to take advantage of the PSP policy to help herself fight discrimination. Suders argues that there was no PSP policy (contrary to Petitioners suggestion that the policy was posted – it wasn't). On these grounds the District Court found that the PSP was entitled to relief (the Court said they had a policy and that Nancy failed to take advantage of it). Nancy appealed and the Third Circuit reversed.

SUMMARY OF THE ARGUMENT

A constructive discharge being classified as a tangible employment action is consistent with the holding of *Ellerth/Faragher*, which arguably would not make sense without such a holding, but which further the reasonable parameters of employer responsibility and the commensurate duty to prevent constitutional violations, as per Title VII of an employers supervisors, the very intent of the law.

(3)

Supreme Court, U.S.
FILED
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NO. 03-95

IN THE

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PENNSYLVANIA STATE POLICE,

Petitioner

v.

NANCY DREW SUDERS

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Nancy Suders later filed suit. The District Court found that Nancy Suders failed to take advantage of the PSP policy to help herself fight discrimination. Suders argues that there was no PSP policy (contrary to Petitioners suggestion that the policy was posted – it wasn't). On these grounds the District Court found that the PSP was entitled to relief (the Court said they had a policy and that Nancy failed to take advantage of it). Nancy appealed and the Third Circuit reversed.

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AUG 18 2003

(2)

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Petitioners,

v.

NANCY DREW SUDERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37(2)(b), the Chamber of Commerce of the United States ("the Chamber") respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari in this case. The written consent of the petitioners has been filed with the Clerk of the Court. Counsel for the respondent has refused to consent to the filing of this brief.

The Chamber is the nation's largest business federation representing an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and in every state. As the principal voice of American business, the Chamber regularly advocates the interests of its members in court on issues of

critical concern to the business community. This case is important to the Chamber and all of its members, as it has significant implications for the workplace and employers' ability effectively to monitor harassment.

As a direct result of the incentives crafted by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), employers have made great strides in training managers and co-workers in what constitutes appropriate conduct in the workplace. The Third Circuit's decision in *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), *cert. pending* (No. 03-95), threatens, however, to undermine the incentives put in motion by *Faragher* and *Ellerth*, for it broadens the concepts of "tangible employment action" to include employee resignations that a court later characterizes as amounting to a "constructive discharge." Because a quit is inherently different than a termination, (i.e., constructive discharge law does not require notice to the employer before an employee quits), the employer community is concerned that if the Third Circuit's approach were widely followed, a perverse dynamic would be created. Employees, more interested in boosting the value of their claim than fixing the underlying problem, would have an incentive to resign in lieu of remaining employed and providing notice, thereby impeding an employer's ability to remedy the situation.

In filing a brief as *amicus curiae*, the Chamber seeks to supplement, rather than duplicate, petitioners' arguments. While petitioners certainly assert a similar interest in this appeal, they necessarily do so from the far more limited perspective of litigants in a particular organization seeking to protect their interests in this case-specific context. The Chamber, in its *amicus* brief, provides this Court with the broader perspective and concerns of the overall American business community. In light of the Chamber's special vantage, the Chamber's brief plainly falls within the category of submissions likely to aid the Court's work because it "'inform[s] the court of interests other than those represented by the parties, and . . . focus[es] the court's attention on the broader implication[s] of various possible rulings.'" Robert L. Stern et al., *Supreme Court Practice* 659-60 (8th ed. 2002).

For the reasons given, *amicus curiae* The Chamber of Commerce for the United States therefore respectfully requests leave to file the accompanying brief.

Respectfully submitted,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents more than three million businesses and organizations in every size, sector and geographic region of the country.[1] An important function of the Chamber is to represent the interests of its members in litigation raising issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court and the federal Courts of Appeals, including numerous employment discrimination cases. *See, e.g.*,

[1] No counsel of any party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84 (2d Cir. 2002).

The Chamber fully endorses the need to afford protection for plaintiffs seeking redress for sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. As a direct result of the incentives crafted by this Court in *Faragher* and *Ellerth*, employers have made great strides in training managers and co-workers in what constitutes appropriate conduct, implementing zero-tolerance-of-harassment policies, establishing user-friendly, effective internal complaint procedures, and vigorously investigating complaints of sexual and other harassment in the workplace.[2] By recognizing an affirmative defense to strict employer liability for companies that adopt and engage in pro-active training and remedial action,[3] this Court set in motion important behavioral incentives, for both companies and potential victim employees, that have had an enormously beneficial influence in fostering a supportive, non-harassing workplace culture for women, racial and ethnic minorities, and indeed all Americans.

The Court in *Faragher* and *Ellerth*, of course, precluded the availability of this affirmative defense when activities of supervisors constitute a "tangible employment action." This

[2] The anti-harassment policies and practices of leading companies, including JP Morgan Chase, Atlantic Richfield, the Segal Company, and Credit Suisse First Boston, are described in Sexual Harassment in the Workplace: Proceedings of New York University 51st Annual Conference on Labor (S. Estreicher ed., Kluwer Law International, 1999).

[3] An affirmative defense to hostile work environment liability exists where the employer (1) "exercise[s] reasonable care to prevent and correct promptly any sexually harassing behavior," and where the plaintiff (2) "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

critical term, while not defined, was not an open-ended invitation to judicial creativity, for the Court made clear the kinds of decisions it had in mind, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790. What these actions all have in common is that they involve "company act[s]," where the company as an entity must act to effect the decision, and hence presumably notice to the company ordinarily would have preceded the decision. *Ellerth*, 524 U.S. at 762 ("A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.").

The Third Circuit's decision in *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), *cert. pending* (No. 03-95), however, threatens to undermine the incentives put in motion by *Faragher* and *Ellerth*, for it broadens the concept of tangible employment action to include employee resignations that a court later characterizes as amounting to a "constructive discharge." The problem here is that a constructive discharge is simply a legal construct for treating a quit as a discharge for the limited purpose of allowing the plaintiff to argue that the quit should not be treated as a wholly voluntary act. A quit remains, however, a non-tangible employment action for purposes of the *Faragher-Ellerth* defense for it does not involve a company act that, even where some documentation may be provided, reasonably puts the company on notice of a potential claim or possible supervisor misconduct.

Current constructive discharge law recognizes the limited office of this concept. Thus, for example, there is no requirement that an employee provide notice to the employer of potential issues surrounding the quit before resigning, or as

a precondition of being able later to call the quit a "constructive discharge." The law incorporates only a standard of reasonableness, which may or may not require notice, depending on the particular circumstances of each case. The employer community is concerned that if the Third Circuit's approach is widely followed, a perverse incentive will be created to encourage employees, more interested in boosting the value of their claim than fixing the underlying problem, to resign in lieu of remaining employed and providing notice, thereby impeding an employer's ability to remedy the situation.

STATEMENT OF THE CASE

The instant case addresses a fundamental issue of importance under Title VII: whether a constructive discharge is a tangible employment action depriving an employer of the *Faragher-Ellerth* affirmative defense. It is an issue that currently divides the Courts of Appeal, and is of significance to employers nationwide.

On or about March 23, 1998, Respondent Nancy Drew Suders began working as a police communications operator ("PCO") with the Pennsylvania State Police ("State Police"). *Suders*, 325 F.3d at 436. Suders alleged that from the start of her employment, she suffered sexual harassment so severe that she felt compelled to resign *only five months later*—on August 20, 1998. She named Defendants Sergeant Eric D. Easton, Patrol Corporal William D. Baker and Corporal Eric B. Prendergast as the principal offenders.

Suders admittedly knew of the State Police's policy prohibiting sexual harassment, which was posted at her barracks and distributed to all employees. *Suders*, No. 00-1655, (M.D. Pa. Aug. 16, 2001) (Pet. App. 79a). In June 1998, and as part of her training, Suders also attended a seminar on sexual harassment led by the State Police's equal employment officer, Virginia Smith-Elliot. *Suders*, 325 F.3d

at 438. At that time, Suders told Smith-Elliot that she might need some help, but did not provide any details. *Id.* Smith-Elliot gave Suders her telephone number, but never heard from Suders until August 18, 1998, two days before her resignation. *Id.*

On August 18, Suders contacted Smith-Elliot and told her that she was being harassed.[4] According to Suders, Smith-Elliot told her to fill out a complaint form, but did not tell her where to obtain the form. According to Smith-Elliot, however, she promised to send Suders the complaint form. 325 F.3d at 438.

Two days after her conversation with Smith-Elliot, Suders resigned. The precipitating cause appears to have been an incident relating to scores she received on a computer skills test. 325 F.3d at 439. Suders' supervisors had told her that she repeatedly failed the computer skills test, but Suders had not seen her actual scores. In an effort to find the test results, she went through a drawer in the women's locker room. She found the test papers and removed them. *Id.* Once it was discovered that these papers were lost, officers dusted the drawer with theft detection powder. On August 20, 1998, Suders went back into the drawer, allegedly to return the test papers, but the powder turned her hands blue. *Id.* When confronted, she told Corporal Baker that she was resigning. Suders claimed that she was then treated as a suspect, and was photographed and questioned. Suders then turned in a letter of resignation that she had been carrying with her, and eventually was permitted to leave. *Id.*

Suders thereafter filed suit, alleging violations of Title VII; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; and the Pennsylvania Human Relations Act,

---

[4] According to Smith-Elliot, Suders did not complain of sexual harassment, but complained only of age and political affiliation discrimination. *Suders*, 325 F.3d at 438.

43 Pa. Cons. Stat. Ann. §§ 951 *et seq.* After the parties completed discovery, the State Police moved for summary judgment. *Suders*, 325 F.3d at 438.

The district court granted the motion for summary judgment in its entirety. With respect to Suders' sexual harassment claim, the district court held that issues of fact existed as to whether Suders had been subject to a hostile work environment. However, the court ruled that the State Police had established an affirmative defense to vicarious liability for the actions of its supervisors. *Suders*, No. 00-1655 (M.D. Pa. Aug. 16, 2001) (Pet. App. 80a). The trial court found determinative that Suders did not give the State Police any meaningful time to respond to her complaints. The district court noted:

> Plaintiff finally did contact Smith-Elliot on August 28, 1998, however, this was only two days before she resigned. Smith-Elliot told Plaintiff to fill out a complaint form, located in the Administrative Regulation manual. However, Plaintiff resigned from her employment two days later, and the PSP was never given the opportunity to respond to any complaints of sexual harassment.

Id.

On appeal, the Third Circuit concluded that the district court erred in two respects. First, the panel held, summary judgment was inappropriate because a material dispute of fact existed as to whether the State Police exercised reasonable care to prevent or correct the sexual harassment that Suders allegedly suffered. 325 F.3d at 443. Neither the State Police nor the Chamber challenge this aspect of the appeals court's holding.

Although the Third Circuit could have ended its inquiry at this point, the court turned to what it stated was the critical issue: whether a constructive discharge, when proved, constitutes a tangible employment action.

The court acknowledged the existence of a square conflict among the Circuits on this issue. It noted that the Second and Sixth Circuits have held that a constructive discharge does not constitute a tangible employment action, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000); *Turner v. Dowbrands, Inc.*, 221 F.3d 1336 (6th Cir. 2000) (unpublished), whereas the Eighth Circuit and, to a certain degree, the Fifth Circuit have reached the opposite conclusion. *Jackson v. Arkansas Dept. of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002); *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1254 (2003).

Rejecting the reasoning set forth by the Second and Sixth Circuits, *Suders* held that a constructive discharge does constitute a tangible employment action under *Faragher* and *Ellerth*. According to the court below, when a constructive discharge is proven, the trier of fact may *not* consider the employer's *Faragher-Ellerth* affirmative defense, but instead must hold the employer strictly liable—irrespective of whether any notice of the underlying misconduct had been provided to the employer, or whether the plaintiff by invoking the internal complaint procedure effectively and promptly could have put a halt to the offending conduct.

SUMMARY OF ARGUMENT

Under *Faragher* and *Ellerth*, a constructive discharge does not constitute a "tangible employment action" for which the employer is automatically held vicariously liable for the acts of its supervisors. The Courts of Appeals have competing and irreconcilable views on this very question.

A constructive discharge, by its nature, is not the sort of "official company act," *Ellerth*, 524 U.S. at 762, for which the Supreme Court has deemed it appropriate to hold an employer strictly liable. Unless an employee reports conduct to the employer, the employer will not have an opportunity to investigate, to correct the problem, and to provide an effective remedy to the victim.

An important policy underlying both *Faragher* and *Ellerth* is that employers should encourage employees to report harassing conduct by a supervisor, and the method of encouragement selected by the Court is a rule of contingent liability for the employer. Accordingly, the employer is afforded an affirmative defense to vicarious liability when the supervisor's harassment does not culminate in a tangible employment action—*i.e.*, an "official company act" which the employer could detect even in the absence of a complaint by the affected employee.

To equate a constructive discharge with an actual termination for *Faragher-Ellerth* purposes, as the Third Circuit insisted below, distorts well-established understandings of constructive discharge doctrine. A constructive discharge is simply a legal construct for treating a quit as a discharge for the limited purpose of allowing the plaintiff to argue that his or her quit should not be treated as a wholly voluntary act. A quit remains, however, a non-tangible employment action for purposes of the *Faragher-Ellerth* defense for it does not involve a company act that, even where some documentation may be provided, reasonably puts the company on notice of a potential claim.

Constructive discharge theory does not require an employee to provide notice to an employer of sexual harassment before resigning. It only requires a standard of reasonableness. Because no notice requirement exists, no incentive exists for employees to report conduct well before quitting their employment.

ARGUMENT

A. The Courts of Appeals are Divided over Whether a Constructive Discharge Amounts to a "Tangible Employment Action" for Purposes of the *Faragher -Ellerth* Affirmative Defense.

1. The Position of the Second and Sixth Circuits.

The first federal appellate court to address whether a constructive discharge constitutes a tangible employment action after *Faragher* and *Ellerth* was the Second Circuit in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). Holding that a constructive discharge does not constitute a tangible employment action, the panel drew from this Court's reasoning in *Ellerth* the principle that "employer liability would be imposed without the possibility of an affirmative defense *only* where the employer is implicated in the harm visited upon the employee by his or her supervisor." *Caridad*, 191 F.3d at 294 (emphasis added). "Unlike demotion, discharge or similar economic sanctions"—the examples this Court gave in introducing the concept of a tangible employment action, *see Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790—"an employee's constructive discharge is not ratified or approved by the employer," explained former Chief Judge Newman for the appeals court.[5]

---

[5] Moreover, as the *Caridad* court noted, 191 F.3d at 295-96, in *Ellerth* itself, "Ellerth alleged Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII of the Civil Rights Act of 1964." *Ellerth*, 524 U.S. at 742. In remanding the case, this Court concluded, "[a]lthough *Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik*, which would deprive Burlington of the availability of the affirmative defense, this is not dispositive. In light of our decision, Burlington is still subject to vicarious liability for Slowik's activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability." 524 U.S. at 766 (emphasis added).

The Sixth Circuit is in accord. For the reasons stated in *Ellerth* and *Caridad*, the court in *Turner v. Dowbrands*, 221 F.3d 1336 (6th Cir. 2000) (unpublished), held that a "plaintiff's claim of constructive discharge did not constitute a tangible employment action" for purposes of *Faragher* and *Ellerth*.[6]

2. The Position of the Third and Eighth Circuits.

By contrast, the Eighth Circuit joins the Third Circuit in rejecting the availability of the *Faragher-Ellerth* defense because, in their view, a constructive discharge is the "functional equivalent" of an actual termination. *See Suders*, 325 F.3d at 458-59 ("in the same way as a formal discharge, a constructive discharge 'constitutes a significant change in the employment status,' by ending the employer-employee relationship"); *Jackson v. Arkansas Dept. of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001) (if the plaintiff had in fact been constructively discharged, then "the constructive discharge would constitute a tangible employment action and prevent the Department from using the affirmative defense"), *cert. denied*, 536 U.S. 908 (2002).[7]

As demonstrated above, the Courts of Appeals have competing and irreconcilable views on whether a constructive discharge constitutes a tangible employment action. Based on this conflict, this Court should grant the Petition for Writ of Certiorari.

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[6] Apparently, the First Circuit agrees that most instances of constructive discharge do not preclude invocation of the *Faragher-Ellerth* affirmative defense, but declines to adopt a flat rule. *See Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (2003) ("Here, it is clear to us that the constructive discharge label cannot be used to preclude the affirmative defense; but possibly, on rare facts, it might be appropriate for that purpose.").

[7] To like effect is dicta from the Fifth Circuit in *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405 (2002) (noting that the plaintiff "does not advance a coherent claim of constructive discharge or other tangible employment actions by [the employer"]), *cert. denied*, 123 S. Ct. 1254 (2003).

B. Treating a Constructive Discharge as an Occasion for Strict Employer Liability Undermines the Critical Behavioral Incentives this Court Fashioned in *Faragher* and *Ellerth*.

In *Faragher* and *Ellerth*, the Court confronted the question of which standard of liability should be imposed on employers when their supervisors engage in unlawful harassment. The spectrum of liability ranged from simple negligence (the standard governing co-worker harassment) to strict or "automatic" vicarious liability. To promote Title VII policies encouraging both employer internal compliance with anti-harassment mandates and claimant minimization of harm (by invoking available, effective internal procedures), the Court recognized that, save for "tangible employment actions," employer liability should be conditional, subject to an affirmative defense. The circuits recognizing a constructive discharge exception to this framework threaten to unravel the beneficial incentives for transforming workplace culture that this Court set in motion in *Faragher* and *Ellerth*.

1. A Constructive Discharge Is Not "An Official Act of the Enterprise" under *Faragher* and *Ellerth*.

This Court offered some guidance concerning the concept of tangible employment actions. Such actions must involve "an official act of the enterprise," *Ellerth*, 524 U.S. at 762, which, in most cases, "inflicts direct economic harm." *Id.* Such actions must "constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Although the examples provided by the Court of tangible employment actions were not exhaustive, constructive discharge was not listed or included. *Id.*

The rationale for holding an employer strictly liable when a supervisor's harassment culminates in discharge, demotion, or other tangible employment action is that the supervisor, by taking such action, becomes the employer's "proxy": "he 'merges' with the employer, and his act becomes that of the employer." *Faragher*, 524 U.S. at 790. Additionally, because a tangible employment action is an "official company act," *Ellerth*, 524 U.S. at 762, the Court found that the employer, in most cases, has the opportunity to review and evaluate the supervisor's action after the fact:

> A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

Id. The company may also have the opportunity to evaluate the supervisor's action before it is taken, if prior approval is required. *See id.* ("The supervisor often must obtain the imprimatur of the enterprise and use its internal processes."). The underlying policy is that, by imposing unconditional strict liability for harassment culminating in a tangible employment action, employers will have a greater incentive to review and to monitor their supervisors' official decisions and actions.

This policy judgment is inapposite when an employee resigns, and later alleges a constructive discharge. What is missing is the "official company act"—an action that is documented and/or subject to review by higher management. Because the employee ultimately controls the decision whether and when to resign, and reasons need not be given (and are not required as a prerequisite to invoking a constructive discharge), the resignation may come as a complete surprise to the employer. A quit simply does not afford the employer sufficient opportunity to react and remedy a problem, because it does not put the enterprise on notice that the circumstances occasioning the quit may

involve possible supervisory misconduct. Indeed, only a rule that treats constructive discharge claims as subject to the *Faragher-Ellerth* defense creates an incentive for the claimant to put the employer on such notice.

2. The Concept of Constructive Discharge Serves Only to Supply One Element of the Plaintiff's Prima Facie Case. It Has No Bearing in Determining Those Occasions Warranting Strict Employer Liability.

To assert an action under Title VII, a plaintiff must demonstrate an "adverse employment action." *See Suders*, 325 F.3d at 435, n.1. This is a necessary element of a prima facie case under Title VII. *Id.*

An individual who voluntarily resigns from employment has not, on the face of things, suffered an adverse employment action, and therefore has no cause of action under Title VII concerning the termination from employment. A constructive discharge, however, if proven, permits a plaintiff to transform a non-actionable event—a resignation—into a potentially viable claim. Thus, a constructive discharge serves the limited purpose of supplying plaintiff with one element of the prima facie burden. *See Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) ("When a constructive discharge is found, an employee's resignation is treated—*for the purpose of establishing a prima facie case* of employment discrimination—as if the employer had actually discharged the employee.") (emphasis added).

As even the lower court in this case recognized, the concept of a tangible employment action under *Faragher* and *Ellerth* is distinct from, and much narrower than, that of an adverse employment action. *Suders*, 325 F.3d at 435, n.1 ("we understand a tangible employment action as being a narrower, more restricted category of actions occurring in the workplace"). Although *Suders* acknowledged that a tangible

employment action is a "narrow, more restricted category," its analysis of whether a constructive discharge falls into this category betrays faith with that acknowledgement. For the Third Circuit panel, the analysis effectively ended with the conclusory judgment that a constructive discharge is the functional equivalent of a termination. *See id.* at 458-59 ("in the same way as a formal discharge, a constructive discharge 'constitutes a significant change in the employment status,' by ending the employer-employee relationship.") The Third Circuit failed to consider that, in reality, the employee and employer play very different roles when an employee resigns, as opposed to when an employer effects a discharge.

As stated above, *Ellerth* was clear that a "a tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Ellerth*, 524 U.S. at 762. The company may also have the opportunity to evaluate the supervisor's action before it is taken, if prior approval is required. *See id.* ("The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.").

Where an employee resigns, however, higher level management typically has no opportunity to weigh in on the employee's quit decision because the act of resignation is inherently ambiguous. There are many reasons that employees quit that have nothing to do with the employment relationship. As mentioned, employees do not always give reasons for their quit, nor is the giving of reasons required. Absent a rule effectively requiring the provision of notice to the employer—a rule offered by *Faragher* and *Ellerth* but rejected by the panel below—an employer may have no reason to suspect that misconduct of any kind prompted the quit.

Under these circumstances, strict liability is an inappropriate standard because it is the resigning employee, not

the employer, who has "acted" in any way, official or otherwise. Of course, a plaintiff may proceed with a Title VII claim via a constructive discharge theory even where no notice to the employer has occurred. But what the Third Circuit purports to foreclose is the employer's right to demonstrate that the *Faragher- Ellerth* defense is meritorious on the facts.

In short, absent the narrow category of "official act[s] of the enterprise," *Ellerth*, 524 U.S. at 762, the *Faragher-Ellerth* affirmative defense holds employers to the correct standard. Employers are brought to account when they choose to turn a blind eye towards an employee complaint, and, conversely, should be able to avoid strict liability if they take seriously their internal compliance duties by investigating and remedying claimed misconduct brought to their attention.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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August 18, 2003

Supreme Court, U.S.
FILED
JAN 20 2004
OFFICE OF THE CLERK

No. 03-95

In the Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner

v.

NANCY DREW SUDERS,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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Petition for certiorari filed July 14, 2003
Petition for certiorari granted December 1, 2003

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DECISION UNDER REVIEW

Note: The decision of the Court of Appeals is reprinted in the appendix to the petition for certiorari at 1a.

U.S. District Court
Middle District of Pennsylvania (Harrisburg)
CIVIL DOCKET FOR CASE #: 1:00-cv-01655-SHR

Suders v. Easton, et al
Assigned to : Judge Sylvia H. Rambo
Referred to: Date Filed: 09/18/00
Demand: $0 Jury Demand: Plaintiff
Lead Docket: None Nature of Suit: 440 Civil Rights: Other
Related Cases: None
Case in other court: None Jurisdiction: Federal Question
Cause 42:2000 Job Discrimination (Sex)

09/18/2000 1 COMPLAINT-N/C to counsel. Jury Trial Demand. Receipt #: 132187 Amt: 150.00 (related to 1:00-CV-670) (pm) Modified on 09/19/2000 (Entered: 09/19/2000)

* * * * *

11/17/2000 6 ANSWER by defendants to pltf's complaint and c of s. (jc)(Entered: 11/20/2000)

* * * * *

05/31/2001 14 MOTION - by defendants for summary judgment Cert. of non-conc. (c/s) (am) (Entered: 05/31/2001)

05/31/2001 15 STATEMENT OF FACTS - by defendants in support of motion for summary judgment [14-1] (c/s) (am) (Entered: 05/31/2001)

05/31/2001 16 APPENDIX - filed by defendants in support of its motion for summary judgment [14-1] (c/s) (am) (Entered: 05/31/2001)

05/31/2001 17 BRIEF - by defendants IN SUPPORT of motion for summary judgment [14-1] (c/s) (am) (Entered: 05/31/2001)

* * * * *

06/25/2001 20 BRIEF by pltf Nancy Drew Suders IN OPPOSITION to motion for summary judgment [14-1]; reply brief due 7/9/01; with c/s and propo. (sc) (Entered: 06/26/2001)

06/25/2001 21 COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS by pltf Nancy Drew Suders [15-1]; with c/s. (sc)(Entered: 06/26/2001)

07/12/2001 22 REPLY BRIEF by defendants in support of motion for summary judgment and c of s. [14-1] (jc) (Entered:07/13/2001)

08/16/2001 23 MEMORANDUM AND ORDER: by Judge Sylvia H. Rambo: IT IS HEREBY ORDERED THAT: 1. Defts' motion for summary judgment on all counts of plf.'s complt. it is granted; (2) The clerk of crt. shall enter jgm in favor of defts. and against plf. and close the case. [14-1](cc: all counsel, Crt. & Security) (am) (Entered: 08/16/2001)

08/16/2001 24 JUDGMENT: Entered by the deputy clerk; IT IS ORDERED AND ADJUDGED that SJ be and is hereby entered in favor of the defts., Eric D. Eason, William D. Baker, Eric B. Prendergast, Virginia Smith and The Pennsylvania State Police and against the plf., Nancy Drew Suders. Case terminated (cc: all counsel, Crt. & Security) (am) (Entered: 08/16/2001)

09/10/2001 25 NOTICE OF APPEAL by pltf Nancy Drew Suders from District Court order & jgm filed 8/16/01 [23-1] (Filing fee paid, TPO mailed, cert copies

of noa, order & jgm being appealed, & docket entries w/ info/ack ltr., [24-2] to USCA. (cc: cnsl, Ct.) Receipt No. & Amt: 111 134771 $105.00 (sc) (Entered: 09/12/2001)

* * * * *

05/12/2003 30 JUDGMENT of USCA (certifies copy) - IT IS NOW HERE AND ORDERED AND ADJUDGED by this Court that the Order of the said District Court entered on 8/16/01, be and the same is, hereby REVERSED AND REMANDED for a disposition on the merits of pltf's clms pursuant to Title VII of the Civil Rights Act of 1964, 42 USC 2000e against the PA State Police. [25] Notice of Appeal filed by Nancy Drew Suders. (sc) (Entered: 05/13/2003)

05/13/2003 31 NOTICE from court re. the schd'ng of a cmc for 6/23/03 @ 9:15 am; this conference is by phone and the call is to be initiated by the pltf. (ma,) (Entered: 05/13/2003)

06/03/2003 32 MOTION to Cancel Scheduling Conference and Stay Proceedings filed by dfts Baker, Easton, Smith Elliott, Pennsylvania State Police & Prendergast; with c/s. (Attachments: #1 Cert. of Conc. #2 Proposed Order) (sc) (Entered: 06/04/2003)

06/04/2003 33 ORDER granting 32 Motion to Stay; Sched conf of 6/23/03 is canceled Signed by Judge Sylvia H. Rambo on 6/04/03 (ma,) (Entered: 06/04/2003)

GENERAL DOCKET
US Court of Appeals for the Third Circuit

Court of Appeals Docket # : 01-3512
Filed:9/18/01
Nsuit: 3440 Civil Rights: Other
Suders v. Easton, et al
Appeal from: U.S. District Court for the Middle District of Pennsylvania

_ _
Lower court information:

District: 0314-1 : 00-cv-01655
Trial Judge: Sylvia H. Rambo, District Judge
Date filed: 9/18/00
Date order/judgment: 8/16/01
Date NOA filed: 9/10/01

_ _
01-3512 Suders v. Easton, et al

9/18/01 CIVIL CASE DOCKETED. Notice filed by Nancy Drew Suders. (tyw)

* * * * *

4/11/02 ARGUED Thursday, April 11, 2002 Panel: McKee, Fuentes Circuit Judges and Pogue, U.S. Court of International trade. (eh)

4/16/03 PUBLISHED PRECEDENTIAL REPORTED OPINION (McKee, Fuentes, Authoring Judge, Circuit Judges and, *Pogue, Judge of International Trade), filed. *Honorable Donald C. Pogue, United States Court of International sitting by designation. (tyw)

4/16/03 JUDGMENT the order of the District Court entered on August 16, 2001 is reversed and remanded for a disposition on the merits of plaintiff's claims pursuant to Title VII of the Civil Rights Act of 1964, 42

U.S.C. section 2000e, ZZ_et ZZ_seq., against the Pennsylvania State Police, filed. (tyw)

5/8/03 MANDATE ISSUED, filed. (cmd)

5/8/03 RECORD released. (cmd)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY DREW SUDERS	:	**CIVIL ACTION LAW**
	:	
Plaintiff,	:	
	:	**NO. 1-CV-00-1655**
v.	:	
ERIC D. EASTON,	:	
WILLIAM D. BAKER,	:	
ERIC B. PRENDERGAST	:	
VIRGINIA SMITH-	:	
ELLIOTT, AND THE	:	
PENNSYLVANIA STATE	:	
POLICE,	:	**JURY TRIAL DEMANDED**
	:	
Defendants	:	

COMPLAINT

INTRODUCTORY STATEMENT

1.) This is a civil rights complaint brought to redress grievances for sexual harassment and retaliation where plaintiff was forced to endure an insulting, humiliating work environment, and for being forced to suffer a termination of employment because she would not yield to sexual suggestions, innuendos and solicitatious behavior. Plaintiff also suffered discrimination because of her age and political affiliation.

JURISDICTION AND VENUE

2.) This Court has jurisdiction to hear these claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1343 (a)(3) and

(4). Jurisdiction is also conferred under 42 U.S.C. 2000 et seq. (Title VII) as a remedial statute.

3.) This Court's supplemental jurisdiction is invoked under 28 U.S.C. § 1367 because plaintiff also brings a supplemental state claim under the Pennsylvania Human Relations Act.

4.) Plaintiff additionally claims redress under the provisions of the Age Discrimination in Employment Act of 1967.

5.) A jury trial is demanded.

6.) Punitive damages are requested.

7.) Attorney's fees are demanded.

8.) Venue is properly in the Middle District because all parties, witnesses, events, and other facts are common to Fulton County which is in the Middle District.

OPERATIVE FACTS

9.) Plaintiff began working for the Pennsylvania State Police (PSP) on or about March 21, 1998.

10.) Plaintiff was subjected to insulting, harassing, solicitatious sexual remarks and embarrassing, humiliating, sexually suggestive actions by the defendants more fully described as follows:

a.) Eric Easton made suggestive comments about panty hose.

B.) Apparently emulating TV wrestling, which he worships, Cpl Baker would stand up, cross his hands in an X motion in front of his body, then take his genitals in

his hands and scream "suck it". He did this on many occasions from when plaintiff was hired until she was forced to resign in August 1998.

C.) Baker had a picture of a wrestler on his wall making the same motion.

D.) In early April 1998, Sgt. Easton was talking about his wife, commenting how she had little breasts.

E.) During plaintiff's performance evaluation in May 1998, Sgt. Easton began talking about people having sex with animals.

F.) In June 1998 Cpl. Baker commented that an African American PSP trooper married a white woman because she "had an ass like a Black woman".

G.) PCO Strait asked Cpl. Baker if he could rub the hair on his legs.

H.) Cpl. Baker, reciprocated by rubbing Strait's back and saying romantic things. Both Baker and Strait thought this display was humorous. Plaintiff was offended.

I.) Prendergast regularly harassed plaintiff telling her he was "watching" her and that "we'll" see that she was the last political appointee who had a job there at the substation.

J.) Baker than said his wife was getting her nipple pierced and then that he was getting his penis pierced.

K.) Easton and Cpl Prendergast had a conversation in plaintiff's presence, knowing and intending that plaintiff hear - saying that if one had a daughter it would be desirous to teach her how to give a "blow job" and after

Prendergast laughed, Easton exclaimed he was serious, he would teach his daughter to "give a blow job". Plaintiff was extremely upset over being exposed to this terrible colloquy.

L.) During plaintiff's job performance evaluation by Sgt. Easton, in July 1998, she was told that she was not going to receive a good review. Comments about sex with animals was repeated by Easton for some strange reason unknown to plaintiff, and plaintiff was told that PSP management was aware she was frightened and afraid of losing her job.

11.) On or about August 1998 the plaintiff called the PSP affirmative action officer Major Virginia Smith Elliott.

12.) Elliott told plaintiff to get a form to fill out but refused to help her further.

13.) Plaintiff was also harassed and ridiculed by Easton and Baker over her age:

A.) Easton commented sarcastically to plaintiff on one occasion, in reference to her age "its awful getting old isn't it" as a way to put plaintiff down in commenting on her job performance.

B.) Easton told a friend of plaintiff's that a 25 year old fresh out of college could catch on faster than plaintiff could.

C.) Baker commented several times that he should call plaintiff "mamma" because of her age.

D.) Easton called the Republican County Chairman and requested a meeting, telling the chairman that he was sending plaintiff to Bedford County, Easton had (meaning by the Governor's office), told plaintiff that she

had political influence, (meaning through the Governor's office) and that he wanted her to help get his son a job. Plaintiff did not respond to Easton, and believes, on information and belief, that he retaliated against her for not helping him.

E.) When Baker asked plaintiff how long she had been married, and she replied 38 years, he taunted her in response "Than I can call you mom"

F.) Baker at times, would refer to plaintiff as "mamma" when giving directions.

14.) Plaintiff at all times suffered from defendants' misconduct, and their harassing, discriminatory behavior, and, because they knew she was not receptive to their sexual suggestions and insults, defendants were increasingly more suggestive and insulting.

15.) When plaintiff refused to assist Easton with a request to help him place his son (Easton believed plaintiff had "political influence", and when plaintiff reacted adversely to defendants' excessive familiarity to other females in the office, the defendants continued their escalating policy of progressively harassing plaintiff more and more.

16.) Plaintiff had taken a computer test, on Easton's orders, for the PSP, that was to be forwarded to PSP Head Quarters.

17.) On or about the end of July 1998 plaintiff was using the ladies room at the substation while at work.

18.) In the ladies room were 2 dressers, a shower, (and a bed). The dressers were unmarked, are no one's personal property, have no signs or notices on them, are, unlocked, and had never been identified to plaintiff by

anyone as theirs or anyone else's property.

19.) On the night in question plaintiff noticed a drawer partly ajar to one dresser and looked in.

20.) Out of simple curiosity plaintiff opened the dresser drawer and found it had thong bikinis, bras, and negligee nighties. Plaintiff looked further.

21.) In another drawer was a group of papers containing personal information about plaintiff including the computer test which Easton had ordered plaintiff to take and which was to be forwarded to Head Quarters.

22.) Plaintiff replaced the papers and raised the issue of her test with Easton. As he responded she realized the testing she had to undergo was a ruse and she had been lied to by Easton.

23.) When plaintiff went back to the dresser drawer to check to confirm that Easton and Jody Lancaster, A PCO, who also lied to plaintiff, was involved in the plot against her, she took the papers, which were now in an envelope, and she replaced them with plain paper.

24.) Later she checked the drawer again to see how Easton and Lancaster responded and got powder on her hands which had been placed there, and throughout the ladies room, by the PSP, at Easton's urging.

25.) Easton, and other PSP operatives then began threatening plaintiff with the absurd proposition that she had committed a crime ie. had "tampered with files" by virtue of her having investigated why her personal papers were in an unmarked dresser drawer with a plethora of intimate sexy apparel, near a bed, in a ladies room, in a PSP substation.

26.) The defendants repeated this ridiculous threat designed to intimidate plaintiff in their PHRC Answer, replete with an alleged opinion from a district attorney, that they had probable cause to bring criminal charges, but did not do so, ostensibly because of the DA's suggestion to handle it internally.

27). Regardless, when defendants, by and through PSP operatives, on August 20, 1998, threatened plaintiff, she felt she had no choice but to resign, and did so out of fear, and because of the threat of a malicious and vindictive investigation and prosecution by the defendants.

28.). Plaintiff, on August 18, 1998 had formally requested help from the PSP affirmative action officer Virginia Smith Elliot who refused to take her telephone request for an investigation, instead telling her she had to make a formal written request, which is against stated PSP policy, and thus in violation of plaintiff's rights pursuant to 42 U.S.C. § 2000 et seq. (Title VIII).

COUNT I

PLAINTIFF AGAINST ALL DEFENDANTS FOR THE DEPRIVATION OF HER FEDERALLY GUARANTEED RIGHTS TO BE FREE OF SEXUAL HARASSMENT FROM HER SUPERVISORS AND HER EMPLOYER

29.) Paragraph 1 through 30 above are incorporated by reference herein.

30.) The defendants Easton, Baker, and Prendergast were all plaintiff's supervisors and they all subjected plaintiff to a humiliating debilitating work environment.

31.) The defendant Elliot owed plaintiff a duty of care consistent with PSP policy.

32.) The defendant PSP is vicariously liable under the facts of this case to the plaintiff.

WHEREFORE plaintiff demands judgement of the defendants for the deprivation of her federally guaranteed rights under 42 U.S.C. § 2000 et seq. together with fees, costs, attorney's fees and such other relief as the Court may deem appropriate.

COUNT II

PLAINTIFF AGAINST ALL DEFENDANTS UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT (PHRA) AS A SUPPLEMENTAL STATE CLAIM

33.) Paragraphs 1 through 32 above are incorporated herein by reference.

34.) The defendants have violated plaintiff's right to be free of unlawful violations composed of gender based discrimination and harassment pursuant to the PHRC.

35.)Plaintiff has exhausted her administrative remedies, receiving a right to sue letter from the U.S. Department of Justice dated August 21, 2000. Plaintiff received this letter on or about September 2000.

WHEREFORE plaintiff demands judgement of the defendants for the violation of her rights under the PHRC together with fees, costs, attorneys' fees, and such other relief as the Court may deem appropriate.

[Signature omitted in printing]
[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY DREW SUDERS	:	**CIVIL ACTION LAW**
	:	
Plaintiff,	:	
	:	**NO. 1-CV-00-1655**
v.	:	
ERIC D. EASTON,	:	
WILLIAM D. BAKER,	:	
ERIC B. PRENDERGAST	:	
VIRGINIA SMITH-	:	
ELLIOTT, AND THE	:	
PENNSYLVANIA STATE	:	
POLICE,	:	**JURY TRIAL DEMANDED**
	:	
Defendants	:	

ANSWER

Defendants, by their attorney, submit the following answer to the complaint.

FIRST DEFENSE

The numbered allegations of the complaint are answered as follows:

This numbered paragraph contains conclusions of law to which NO RESPONSE is required. To the extent they are deemed factual, they are DENIED.

1. This numbered paragraph is a statement of jurisdiction to which NO RESPONSE is required. To the extent it is deemed factual, it is DENIED.

2. This numbered paragraph is a statement of supplemental jurisdiction to which NO RESPONSE is required. To the extent it is deemed factual, it is DENIED.

3. This numbered paragraph is a statement of a claim under the Age Discrimination in Employment Act to which NO RESPONSE is required. To the extent it is deemed factual, it is DENIED.

4. This numbered paragraph is a request for jury trial to which NO RESPONSE is required. To the extent it is deemed factual, it is DENIED.

5. This numbered paragraph is a request for punitive damages to which NO RESPONSE is required. To the extent that it is deemed factual, it is DENIED.

6. This numbered paragraph is a request for attorneys fees to which NO RESPONSE is required. To the extent it is deemed factual, it is DENIED.

7. ADMITTED.

8. ADMITTED.

9. DENIED.

A). DENIED as stated.
B). DENIED.
C). DENIED.
D). DENIED.
E). DENIED.
F). DENIED.
G). DENIED.
H). DENIED.
I). DENIED.
J). DENIED.
K). DENIED.

L). DENIED in part; ADMITTED in part. It is DENIED that while discussing plaintiff's performance review, Sergeant Easton began talking about having sex with animals. It is ADMITTED that Sergeant Easton would have informed the plaintiff of her poor performance during her performance review. It is further ADMITTED that Sergeant Easton told plaintiff that he knew she was upset and afraid of losing her job.

10. ADMITTED.

11. ADMITTED in part, DENIED in part. It is ADMITTED that plaintiff inquired about the procedure for filing a complaint and that Major Smith-Elliot advised plaintiff that she would not be available for a several week period in late August to help her fill out the complaint and therefore could not personally process the complaint. It is DENIED that Major Smith-Elliot refused to help plaintiff.

12. DENIED.

A). DENIED as stated. By way of further information, Sergeant Easton often makes comments about himself getting old, however, these comments were never directed at plaintiff or anyone else.

B). ADMITTED. By way of further explanation, Sergeant Easton does recall a meeting he had with Mike Fix on which Mr. Fix inquired how the other PCO's were doing in comparison to plaintiff. In plaintiff's defense, Easton told Fix that plaintiff's progress cannot be compared to the other two as one had previous experience and the other was just out of college.

C). DENIED.

D). AFFIRMED in part; DENIED in part. It is AFFIRMED that Sergeant Easton contacted the Chairman in an attempt to resolve work related problems involving plaintiff and to see if sending her to another station for training would be beneficial for all the parties. It is DENIED that Sergeant Easton asked for plaintiff's help to

get his son a job. It is further DENIED that Sergeant Easton retaliated against plaintiff for any reason, including because of the alleged job request.

E). DENIED.

F). DENIED.

13. This numbered paragraph contains conclusions of law to which NO RESPONSE is required. To the extent they are deemed factual, they are DENIED.

14. This numbered paragraph contains conclusions of law to which NO RESPONSE is required. To the extent they are deemed factual, they are DENIED.

15. ADMITTED. By way of further information, all employees are required to be certified and take an annual test for this purpose.

16. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of this numbered paragraph to be able to admit it; therefore, it is DENIED.

17. ADMITTED, in part; DENIED in part. It is ADMITTED that there were two dressers, a shower, a bed and a commode in the women's bathroom. By way of further information, the barracks used to be housing quarters and there are dressers in the women's bathroom that are used by the female employees to keep their personal possessions. It is DENIED that the drawers were not identified to plaintiff as belonging to other employees. By way of further information, when plaintiff was hired, Jody Lancaster assigned plaintiff two drawers in one of the dressers and gave the other two drawers in the same dresser to Stacy Gelvin. At that time, Jody Lancaster pointed out that her private drawers were in the other dresser.

18. DENIED. After reasonable investigation,

Defendants are without knowledge or information sufficient to form a belief as to the truth of this numbered paragraph to be able to admit it; therefore, it is DENIED.

19. DENIED. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of this numbered paragraph to be able to admit it; therefore, it is DENIED. By way of further information, the female employees used the dresser to keep a change of clothes and other personal possessions.

20. DENIED. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of this numbered paragraph to be able to admit it; therefore, it is DENIED. By way of further information, at the request of Sergeant Easton, another female employee, PCO Jody Lancaster, kept copies of files that plaintiff had completed that needed correction in a plain manila envelope under her personal items in her personal dresser drawer in the locker room. PCO Lancaster kept the papers there because she had no drawers that locked and believed her personal drawer was the best location. It is specifically DENIED that plaintiff's computer test was in the drawer. By way of further information, PCO Lancaster administered the annual test that all employees were required to take and she kept only the answers to the test in her personal drawer because she believed it was a safe place where no one would find the answers.

21. DENIED. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of the first statement in this numbered paragraph; therefore it is DENIED. As for the remainder of the paragraph, it contains conclusions of law to which NO RESPONSE is required. To the extent they are deemed factual, they are DENIED.

22. DENIED. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of this numbered paragraph to be able to admit it; therefore, it is DENIED. By way of further information, during the last week of July 1998 and the first several weeks of August 1998, Sergeant Easton discovered that his file on the plaintiff had been disturbed. During that same period of time, Jody Lancaster reported to Sergeant Easton that the files of plaintiff's mistakes that she had been keeping in a plain manila envelope under her personal items in her personal dresser drawer in the ladies room were missing.

23. DENIED. After reasonable investigation, Defendants are without knowledge or information sufficient to form a belief as to the truth of this numbered paragraph to be able to admit it; therefore, it is DENIED. By way of further information, to discover who was tampering with files, Sergeant Easton dusted a plain envelope with theft detection powder and placed the envelope in Lancaster's personal dresser drawer under numerous other personal items.

24. DENIED as stated. When plaintiff was found trying to scrub off blue theft detection powder which was all over her hands, plaintiff was informed by Sergeant Easton that she was the subject of a criminal investigation and Sergeant Easton read plaintiff her Miranda rights. The plaintiff subsequently admitted being in Lancaster's drawer and removing papers from the envelope in the drawer. Plaintiff then requested an attorney and the interview ended.

25. This numbered paragraph contains conclusions of law to which NO RESPONSE is required. To the extent they are deemed factual, they are DENIED.

26. DENIED. It is specifically DENIED that plaintiff

was forced to resign or threatened by the defendants. To the contrary plaintiff resigned voluntarily.

27. ADMITTED in part; DENIED in part. It is ADMITTED that plaintiff contacted Major Virginia Smith-Elliot, Director, Equal Opportunity Employment Office, sometime prior to plaintiff's resignation and plaintiff inquired about the procedure for filing a complaint. It is further ADMITTED that Major Smith-Elliot advised plaintiff that she would not be available for a several week period in late August and therefore she could not personally process plaintiff's complaint. It is DENIED that Major Smith-Elliot refused to process her complaint. After reasonable investigation, Defendants are without information or knowledge to form a belief as to the truth of the remainder of this averment and, therefore, the remainder is DENIED.

28. Defendants hereby incorporate by reference their responses to paragraphs 1-28 above as set forth at length herein.

29. ADMITTED in part; DENIED in part. ADMITTED that defendants Easton, Baker, and Prendergast were all plaintiff's supervisors. DENIED that they subjected plaintiff to any humiliating, debilitating work environment.

30. This numbered paragraph contains conclusions of law to which NO RESPONSE is required. To the extent they are deemed factual, they are DENIED.

31. This numbered paragraph contains conclusions of law to which NO RESPONSE is required. To the extent they are deemed factual, they are DENIED.

32. Defendants hereby incorporate by reference their responses to paragraphs 1-31 above as set forth at length herein.

33. This numbered paragraph contains conclusions of law to which NO RESPONSE is required. To the extent they are deemed factual, they are DENIED.

34. ADMITTED.

SECOND DEFENSE

The complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

At no time have defendants, either individually or in concert with others, deprived or sought to deprive plaintiff of any rights, privileges or immunities secured to her by the Constitution or laws of the United States.

FOURTH DEFENSE

Defendants Easton, Baker, Smith-Elliot and Prendergast are entitled to qualified immunity from suit.

WHEREFORE, judgment should be entered in favor of defendants.

[Signature omitted in printing]
[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY DREW SUDERS	:	**CIVIL ACTION LAW**
	:	
Plaintiff,	:	
	:	**NO. 1-CV-00-1655**
v.	:	
ERIC D. EASTON,	:	
WILLIAM D. BAKER,	:	
ERIC B. PRENDERGAST	:	
VIRGINIA SMITH-	:	
ELLIOTT, AND THE	:	
PENNSYLVANIA STATE	:	
POLICE,	:	**JURY TRIAL DEMANDED**
	:	
Defendants	:	

DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Defendants, through their counsel and pursuant to Local Rule 56.1, hereby submit that the following facts are material to this action and are not genuinely in dispute:

1. Eric D. Easton was employed by the Pennsyvlania State Police (PSP) as a sergeant and station commander in McConnellsburg from 1996 until 1998. Easton deposition at p. 8-9.

2. Eric Prendergast is employed by the PSP and during the time of the complaint was a corporal at the McConnellsburg barracks. Prendergast deposition at p. 6.

3. William Baker is employed as a patrol corporal by the PSP in the McConnellsburg barracks. Baker

deposition at p. 6-7, 12.

4. Virginia Smith is retired from the PSP but during the time of the complaint, she was the equal employment opportunity officer for the PSP. Smith deposition at at p. 6-7.

5. Nancy Suders began employment as a police communications operator (PCO) on probationary status with the PSP on March 23, 1998. Suders deposition at p. 25-27.

6. Jody Lancaster was a PCO who had been working at the McConnellsburg barracks and on plaintiff's first day, Lancaster explained the working of the communications office to plaintiff, and the other two PCO trainees, Bob Strait and Stacy Gelvin. Suders deposition at p. 40.

* * * * *

8. In June, 1998, Suders attended a two week long PCO training at the police academy. Suders deposition at pp. 40-41.

* * * * *

11. Suders was "humiliated" because her birthday was not on a birthday list that had other employees on it. Suders deposition p. 43-44.

* * * * *

15. Suders believed she was being discriminated against based on her age when Baker allegedly called her "momma." Suders deposition at p. 45.

16. Suders alleges that Easton talked about sex with animals, would wear spandex shorts that allowed

her to see his crotch, talked to Prendergast about teaching daughters to give blowjobs and made a comment to PCO Gelvin about a brand of nylons and that these actions and comments by Easton bothered and scared plaintiff. Suders deposition at p. 46-52.

* * * * *

19. Suders alleges that Baker harassed her by repeatedly doing a wrestiling move which she considered vulgar. Suders deposition at p. 53.

20. Suders allegedly told Baker that she does not think Baker should be doing his move. Suders deposition at p. 53-54.

21. Suders alleges that there was a picture of a wrestler making his motion near Baker's desk and that this picture bothered her. Suders deposition at p. 58.

22. Suders never told anyone that she was bothered or offended by the alleged picture. Suders deposition at p. 59.

23. Suders was offended when Baker complained about his back hurting and PCO Bob Strait rubbed Baker's back and legs. Suders interpreted this to mean that the two men were "sweet on each other." Suders deposition at p. 61-62.

24. Suders alleges that Baker said he was going to get his penis pierced and his wife was going to get her nipple pierced. Suders deposition at p. 63.

25. Suders did not inform Baker that she was offended by his comment. Suders deposition at p. 64.

* * * * *

27. Suders stated that other than the above mentioned comments, there were no other sexual comments made by any employees. Suders deposition at p. 66.

28. Suders believed she was harassed by Prendergast because Prendergast would "watch" her, tell her when she was doing something wrong, and would not "let me alone." Suders deposition at pp. 67-71.

29. Suders felt intimidated when Prendergast wore black gloves and would clap his hands. Suders deposition at p. 72.

* * * * *

32. On August 18, 1998, Suders contacted the affirmative action officer to tell her that she believed she was being discriminated against. Suders deposition at p. 74-75, 93; complaint at ¶ 28; Smith deposition at p. 13.

33. During that conversation, Smith recalls Suders complaining about political affiliation discrimination and age discrimination, but does not recall that Suders mentioned discrimination because she was a woman. Smith deposition at pp. 13-16.

34. Smith told Suders that she needed to file a complaint form so that an investigation could be conducted. Suders deposition at p. 95; Smith deposition at pp. 16-17.

35. Smith did not tell Suders that she would not send her a form, but advised her that there was a form in the AR (administrative regulation) Manuals. Suders deposition at p. 96; Smith deposition at pp. 18-19, 29.

* * * * *

37. When an accident file was missing and employees asked Suders about it, Suders believed she was being accused of taking the file. Suders deposition at p. 76-77.

38. Suders believed Easton had a reputation for liking young girls because when PCO Gelvin was cold, Easton loaned her his jacket to wear. Suders deposition at p. 79.

* * * * *

41. Suders referred to an area in McConnellsburg as the "black community" over the police radio. Suders was offended when she was told by several officers that she should not refer to the area as the "black community" because it could be considered a racial remark. Suders deposition at pp. 88-89.

42. One month after starting her position, Suders received a performance evaluation in which most of the categories were marked "satisfactory." Suders deposition at p. 125.

43. At the end of her probationary period, Suders received another performance evaluation in which most of the categories were marked "needs improvement." Suders deposition at pp. 125-126.

44. Suders did her PCO job, and helped people when they called and no one suffered. Suders deposition at p. 138.

45. Suders received a supervisor's notation on July 22, 1998 because she failed to complete an assignment that was given to her on May 12, 1998. Suders deposition at pp. 140-141; Prendergast deposition at p. 21.

46. On July 26, 1998, Suders was counseled

because she put a CLEAN message about a prison escapee in the crime corporal's bin and did not disseminate the information to patrols. Suders deposition at pp. 142-144; Prendergast deposition at p. 21.

* * * * *

48. Jody Lancaster kept answers to the CLEAN test and copies of some tests in her personal drawer in the ladies' locker room because she believed it was a safe location to place these items where no one could find them. Lancaster declaration at ¶10; Easton deposition at p. 26.

* * * * *

50. When papers were missing, a file was dusted with theft detection powder and placed back in Jody Lancaster's drawer. Baker deposition at p. 36; Easton deposition at pp. 66-67.

51. On August 20, 1998, plaintiff's last day of work, she went into the women's locker room, went into the same drawer where she had taken papers a few days before, went through more papers and when she returned to the communications room, she had blue all over her hands. Suders deposition at pp. 98-102.

* * * * *

54. Instead, on August 20, 1998, Suders voluntarily resigned her position at the PSP by handing in a pre-typed letter of resignation win which she wrote in the date. Suders deposition at pp. 104-107.

* * * * *

58. Suders was aware of the sexual harassment policy, probably received it when she went to the PCO

training and then found the policy in AR Manual. Suders deposition at p. 82.

59. Suders filed a complaint with the Pennsylvania Human Relations Commission in September, 1998. Suders deposition at p. 186.

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[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY DREW SUDERS	:	**CIVIL ACTION LAW**
	:	
Plaintiff,	:	
	:	**NO. 1-CV-00-1655**
v.	:	
ERIC D. EASTON,	:	
WILLIAM D. BAKER,	:	
ERIC B. PRENDERGAST	:	
VIRGINIA SMITH-	:	
ELLIOTT, AND THE	:	
PENNSYLVANIA STATE	:	
POLICE,	:	**JURY TRIAL DEMANDED**
	:	
Defendants	:	

PLAINTIFFS COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS

I.) INTRODUCTORY STATEMENT

Defendants "Statement of Material Facts" is in dispute. Defendants have composed the usual list of facts which tell part of a situation, but not the material part in dispute. Plaintiff has countered paragraph by paragraph by paragraph and added additional material facts which defendants never raised.

1.) Admitted.

2.) Admitted.

3.) Admitted.

4.) Admitted.

5.) Admitted.

6.) Admitted.

* * * * *

8.) Admitted.

* * * * *

11.) Admitted.

* * * * *

15.) Admitted. By way of further response he called her "Mamma" many times and put her down about her age. Suders Dep. pg. 43-45. Easton's comments were constant.

16.) Admitted. Easton remembers the sex with animals comments but says they were part of an incident. Easton Dep. pgs. 53-54.

* * * * *

19.) Admitted. See also Suders Dep. pgs. 53-63. Baker would repeat this obnoxious behavior frequently. She objected, id pgs. 126-127.

20.) Admitted.

21.) Admitted

22.) Admitted

23.) Admitted

24.) Admitted

25.) Admitted

* * * * *

27.) Admitted

28.) and 29.) Admitted. See also Suders Dep. pgs 66-68, 72-73.

* * * * *

32.) Admitted.

33.) Admitted that this is what Smith-Elliott remembers.

34.) Admitted.

35.) Admitted.

* * * * *

37.) Admitted.

38.) Denied. Suders did testify that Easton had a reputation for liking young girls and she did testify as to the incident with the jacket. She also testified to seeing Easton with Jody Lancaster up against a wall. Suders Dep. 79-81.

* * * * *

41.) Admitted. Suders was correct

42.) Admitted

43.) Admitted. Suders was not wanted at the Barracks. Suders Dep. pg 19-22.

44.) Admitted.

45.) Admitted

46.) Admitted. Denied this was deserved or that Suders was capable.

* * * * *

48.) Admitted. Denied that it was a safe place. She could have locked them in a file cabinet or a desk.

* * * * *

50.) Admitted

51.) Admitted. There was no reason not to be in the drawer. She had found some of her personal papers there, and the drawer was not assigned to any one person.

* * * * *

54.) Admitted

* * * * *

58.) Admitted

59.) Admitted

[Signature omitted in printing]
[Certificate of service omitted in printing]

DEPOSITION OF: WILLIAM D. BAKER

* * * * *

[page 7]

Very briefly can you tell us where you have been on your duty assignments?

A. I was a patrol trooper at McConnellsburg station. I was promoted in '96. I was stationed at Gettysburg, patrol corporal. I was at Chambersburg station as a patrol corporal and then finally back in McConnellsburg as patrol corporal. I've been there ever since.

* * * * *

[page 12]

Q Now, briefly describe your duties from '97 on as a corporal at McConnellsburg.

A. I'm a patrol corporal.

Q. What does that mean? What's a patrol corporal do?

A. I run the shift when the sergeant isn't there. I'm a direct immediate supervisor to troopers and PCO's.

* * * * *

[page 19]

Q. Are you a fan of TV wrestling or what's called studio wrestling?

A. Yes.

Q. And did you ever have a poster on the wall at the barracks?

A. No, not that I recall.

Q. Do you know if anyone else had a poster out at the barracks?

A. A poster of what?

Q. Professional wrestlers.

A. Not to my recollection, no.

Q. Have you ever owned a poster with professional wrestlers on it?

A. A poster? Yeah, a poster --

A. No.

Q. -- picture.

A. I've had magazines.

Q. Okay. Well, let's -- not magazines. I'm talking about a poster or a picture, you know, something you'd hang on a wall or --

A. No.

Q. -- anything like that.

Did you ever have anyone posted up on your walls? Nothing on your billboard at the barracks?

A. I don't recall that.

Q. Pardon me?

A. I don't recall that.

Q. Have you ever watched any of these

[page 21]

professional wrestlers on TV when they would cross their arms in front of their body and grab their genitals and say, suck it?

A. Yes.

Q. And have you ever done that?

A. No.

Q. You've never done that?

A. Not that I can recall.

* * * * *

[page 22]

Q. Okay. Now, paragraph F says that, "In June of 1998, Corporal Baker commented that an African-American Pennsylvania State Police trooper married a white woman because she," quote, "had an ass like a black woman."

[page 23]

Did you ever make a comment like that?

A. No.

Q. Is there a PCO out there by the name of Strait?

A. Yes, Bob. Bob Strait.

Q. Bob Strait. It says here that, "PCO Strait asked Corporal Baker if he could rub the hair on his legs."

Do you remember anything like that?

A. No.

Q. Okay. You would have remembered that if that occurred?

A. I believe I would have remembered that.

Q. Probably, okay. Paragraph H says, "Corporal Baker reciprocated by rubbing Strait's back and saying romantic things. Both Baker and Strait thought this display was humorous."There's no allegation that it was serious -- "thought this display was humorous. Plaintiff was offended."

Did anything like that ever occur in your recollection?

A. No.

Q. Paragraph -- subparagraph J of paragraph ten alleges that, "Baker said his wife was getting her nipple pierced and then that he was getting his penis pierced."

Did you ever say anything like that?

[page 24]

A. No.

* * * * *

[page 39]

Q. She was unsupervised when you weren't there?

A. No. Another corporal or sergeant would be there.

Q. But you were her supervisor. They were not her

supervisor?

A. No, I was one of the supervisors.

Q. Oh. Did she have more than one supervisor?

A. The corporals and Sergeant Easton. The sergeant I do believe is technically in charge of the PCO's. He holds their files. That's the way it is right now.

Q. Okay.

A. That's the way I think it always has been.

* * * * *

[Reporter's certification omitted in printing]

DEPOSITION OF: ERIC D. EASTON

* * * * *

[page 8]

Q. In what capacity -- by that I mean, what rank and title did you hold with the Pennsylvania State Police?

A. My rank prior to retiring was sergeant.

Q. Can you briefly describe your duties for us?

A. I was -- when I first made sergeant was stationed down in Harrisburg in charge of the criminal history section. I subsequently was transferred to McConnellsburg in charge of the McConnellsburg barracks, and from there transferred to Holidaysburg in charge of supplies and other various duties.

Q Can you give us timewise when you served at McConnellsburg?

[Page 9]

A. I was at McConnellsburg for approximately two years.

Q Can you give us the dates?

A I'm not positive. I believe it would be 1995 or -- into '96 to 1997 into '98.

Q Okay. Roughly between 1995-1998.

Now, at some time in 1998 did you leave McConnellsburg?

A Yes, I did.

Q Where did you go?

A. Holidaysburg.

Q. Now, do you remember the month that you went to Holidaysburg?

A. No, I don't.

Q. And what were your duties at McConnellsburg?

A. Station commander.

Q. What does a station commander do?

A Oversees the day-to-day operations of the

station.

Q. And who did you report to?

A. To the captain, Captain Holmberg.

Q. What is the region? What is the state police region?

A. It's Troop G.

Q. Troop G.

[page 10]

Now, when you were at McConnellsburg, who was assigned there? Let's begin with state troopers first. Who was assigned there? Strike that. When you were at McConnellsburg, who was assigned -- what was the -- you know in the army they use the term table of organization and equipment.

A. Yes.

Q. So when you were at McConnellsburg, can you tell us who else was employed there?

A. Employed there were I believe four corporals, Corporal Bill Baker, Eric Prendergast, John Sechoka.

Q. Can you spell Mr. Sechoka's name for us, please?

A. S-e-c-h-o-k-a.

Q. Okay. Go ahead. There were four corporals. We have Baker, Prendergast, Sechoka.

A. And I can't think of the other fourth corporal, if there was four. Maybe there was only three and we had a fourth spot.

Q. Okay.

A. And roughly twelve, thirteen troopers.

Q. As many of the names as you can remember of those troopers while you were there, please.

A. Sean Flaherty, Ellis Barnett. I remember them. They were in the crime room. And I'm having a mind

[page 11]

breakdown or something. I can't remember the names of

the other ten or eleven.

Q. Okay. Well, we'll try to go back to that.

Now, did you have other personnel that worked there during that period of time?

A. Yes.

Q. Now, what I would like you to do -- for example, you've given us twelve or thirteen troopers and a few names there, you believe four corporals, maybe one of them was a vacancy, and we have three names there. What other positions, you know, like dispatcher, secretaries, receptionist, whatever they might have been?

A. There was one dispatcher, Jodi Lancaster, and there were three other dispatchers hired while I was there, Bob Strait, Nancy Suders and Stacey Gelvin. I don't believe there was any secretaries.

* * * * *

[page 12]

Q. Can you describe those duties for us, please?

A. Yeah. The title I believe was PCO, police communications operator. Answer the phone, greet visitors, take care of a lot of the paperwork and computer issues, print schedules, handle incidents, answer telephones from citizens, dispatch police personnel to scenes, arrange for assistance if needed for those officers, answer the radio, run the computer; both personal, the in-house computer, and the state computer, and anything -- really basically handle anything that happens during a day's activities.

Q. All right. Now, did you have some type of a shift setup?

A. Yes. There were three shifts at the barracks.

Q. Do you have a recollection of who worked what shift or did you rotate shifts periodically?

A. That was rotated.

Q. How often did shifts rotate?

A. It varied. It could rotate almost daily.

Q. Now, you mentioned those corporals up there. What were their duties? Let's begin with Mr. Baker. Now, it's possible naturally that they all had the same duties. If they did, let's get those down. But if they differed or were individually different in some way, please point those differences out.

Let's begin with Mr. Baker.

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A. Each corporal had some similar duties as far as running the shift, responding to incidents depending on the severity of the incident, and each corporal had some specialized duties. I believe Mr. Baker was in charge of the cars, for example. Corporal Sechoka I believe at the time was the crime supervisor or acting crime supervisor. Eric Prendergast I believe was in charge of updating the files and various manuals in the barracks. Then each corporal also had specific personnel assigned to them to supervise.

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Q Is it fair to say that as a station commander you did not have the choice or last say as to who got hired?

A. True.

Q. And that a person could be hired for the position and placed in the position even against your approval? That's possible, isn't it?

A. Yes.

Q. So although you had input, you did not have control over who might be hired for a position at least as far as the dispatcher position, the PCO position at McConnellsburg was concerned?

A. Yes.

* * * * *

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Q. In paragraph ten, let me read the paragraph to you very quickly. "Plaintiff was subjected to insulting, harassing, solicitatious sexual remarks and embarrassing, humiliating, sexually suggestive actions by the defendants more fully described as follows:" Subsection B, "Apparently emulating TV wrestling which he worships, Colonel Baker would stand up" -- "Corporal Baker," I promoted him there, "would stand up, cross his hands in an X motion in front of his body, then take his genitals in his hands and scream, 'suck it.' He did this on many occasions from when plaintiff was hired until she was forced to resign in August 1998." It's your testimony here today that you have no recollection of Mr. Baker ever doing anything like that?

A No. And I'm not a wrestling fan. I -- if it's a professional wrestling move, I wouldn't --

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Q Okay.

A. I can't even comment about a professional wrestling move. I don't watch it at all.

Q Okay. Subparagraph C, "Baker had a picture of a wrestler on his wall making the same motion." I don't know if the discussion about the particular motion or the alleged motion has refreshed your recollection, but I assume your testimony would remain the same that you don't have any recollection of him having a picture on the wall where any such behavior was pictured?

A. No, I don't, but it had no interest for me. I remember the GTO picture because I thought -- I liked cars. I thought it was a pretty car. I remember the picture of his child because I had met his child and he was a very good-looking kid.

Q. Okay.

A. I don't remember anything else specifically.

Q. All right, sir. Now, I have some -- there are some very significant and graphic allegations made in paragraph ten. I am going to go through them one by one and ask you questions about them. Subparagraph A of paragraph ten says that,"Eric Easton made suggestive comments about pantyhose." Do you have a recollection of ever doing anything like that?

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A. I remember the pantyhose conversation. I did not make any suggestive comments about them.

Q Okay. What do you recollect about that conversation?

A. Stacey Gelvin I think and Nancy were working together. Stacey came in and I just said, you look nice. As I said, I knew Stacey Gelvin from previous contacts through camp cadet and my wife knew her. We were familiar with her. She said, thanks, but I got a run in my stocking, or I don't remember what her words were. I don't think she even showed it to me or anything. And she just said about a run in her stocking. And I said to her because she met -- my wife's name is Beverly. Because she knows Bev, I said, well, Bev buys her stockings at Victoria's Secrets. And I only -- a day or two before we were over in the mall and my wife had bought stockings.

Q. Okay.

A. And she buys this particular brand because they don't run. And so my comment to Stacey Gelvin was, oh, Bev buys some brand of Victoria's Secrets because they don't run. And that was the extent of the conversation.

Q. There was no intention on your part for any suggestive or -- if not suggestive, any -- there was no sexual intent in the comments that you made?

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A. My comment was directed solely and totally at Stacey. I don't even remember if I might have said, maybe you should call Bev and see what brand they are. I used my -- I referred to my wife in the comment --

Q. Okay.

A. -- talking about a brand of stockings.

Q. Okay.

A. And I don't know the brand, so I couldn't identify it.

Q. Do you know whether there's any sexual conduct taking place at McConnellsburg barracks between any troopers or personnel, male or female, there?

A. Not that I'm aware of.

Q. Okay. In subparagraph D of paragraph ten it says -- the allegation is, "In early April 1998, Sergeant Easton was talking about his wife, commenting how she had little breasts." Do you have any recollection of any comment like that?

A. No.

Q. All right. And subparagraph E of paragraph ten says, "During Plaintiff's performance evaluation in May 1998, Sergeant Easton began talking about people having sex with animals." Did anything like that come up?

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A. I remember discussing it with Ms. Suders once. I don't remember discussing it at a performance evaluation.

Q. Okay. Can you tell me what that was about?

A. Yes. The discussion I remember was -- it took place at the front desk of the communications room. Part of a PCO's duties is to -- when they get a call about an incident, take the information about the incident, the complainant -- name, address, phone number -- and the specifics about the incident. It has to be assigned an incident number on our tracking computer. To be able to assign it a number, you have to know the specific title or

classification that you're giving to the incident. And I was explaining that process to her as a rather lengthy explanation covering all the varieties of incidents. And a lot of times you can't assign the specific incident to it until the trooper goes down and gets more information about the crime and a lot of times you may have to go back in and update or change it. I used several different examples. This was one. I remember one example that I always use is the difference between theft, burglary, trespass, like that. If you go into a building,

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if it's a family member, if you're just not welcome there, it's a trespass. If you enter a building and somebody's not there, it could be again trespass or it could be burglary if you have the intent to commit a crime. It could be a theft if it's just a shed. And you have to get into the details of what makes a specific crime that particular crime for classification purpose for the incident to make it a certain particular incident. And I know because we had not too long ago had a case involving a person who was caught in a barn having sex with an animal that towards the end of this discussion I said, for example, a barn, an outbuilding, a shed, because it's not an occupied structure, would not be a burglary. It could be a theft or it could be just a simple trespass, or if somebody was in there -- and we've even had incidents I told her where somebody went into a farmer's barn or shed and had sex with an animal. That's not just trespass. That's actually a certain specific crime with a different classification because that's a violation of a section of the Crimes Code.

Q. Okay. In subparagraph K of paragraph ten, the allegation reads as follows: "Easton," and it has CPT. Let me correct that right now. That would be corporal, CPL; is that correct?

A. Yes.

Q. Okay. "Corporal Prendergast had a conversation

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in plaintiff's presence, knowing and intending that plaintiff hear, saying that if one had a daughter it would be desirous to teach her how to give a blow job," in quotes. "And after Prendergast laughed, Easton explained he was serious. He would teach his daughter to," quote, "give a blow job," unquote. Plaintiff was extremely upset over being exposed to this terrible colloquy." Do you have any recollection of that?

A. No. We discussed child abuse cases in the barracks as they came in, as we investigated them. I investigated child abuse cases in Bedford when I was a criminal investigator almost -- I was the one that was assigned a lot of them. We would have I'm sure had discussions about children, sexual abuse, about parents and how parents raise their children. But no, I would not have said anything like that.

Q. Do you have a recollection of any case that was brought to your attention where a parent was giving one of their children instructions on what to do sexually in their behavior? Do you understand that question?

A. Yes, I think so. I certainly have investigated many cases where parents or stepparents being of the ages between twenty-five and fifty had sex with their sons and daughters down to I believe and including the age of

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two years old.

Q. Well, my question is more specific and it is if you have a recollection of any case where a parent or an adult with -- an adult would teach a daughter or suggest teaching a daughter how to give oral sex because somehow that's going to help her along in the world. Do you have any recollection of anything like that?

A. I know I've investigated cases where parents -- well, if you have a child who is eight, twelve -- ten, twelve years old and you're having sex with them, there has to

be some teaching there. I can't -- that's a -- the way you're phrasing the question it's hard for me to give an answer. I have investigated cases where -- many, many of them where an older baby-sitter, parent, guardian or somebody had to teach the child how to have sex with them, yes.

Q. All right.

A. Did that answer it?

Q. Yeah, partially it does. But did you ever say that you were serious that that would be a good idea?

A. No.

Q. Okay. Do you have a recollection of having any such discussion or any related discussion with Mr.

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Prendergast in Nancy Drew Suders' presence?

A. No. I could easily have been discussing a sexual case with him. I could have said sarcastically to Mr. Prendergast commenting on the depravity of a parent something about their actions. But no, I don't remember ever saying that. But I could have said something about a sexual abuse case in the corporals' office. That's where we would have been talking.

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Q. Okay. Did you ever have Nancy Suders take a computer test for the Pennsylvania State Police to be forwarded to Pennsylvania State Police headquarters?

A. Yes.

Q. Okay. Now, the next series of questions -- I'm going to change just a little bit here. The next series of questions have to do with the ladies' dressing room and the barracks, okay? Are you aware at some time that there was talk of charging Nancy Suders with some type of crime?

[page 66]

A. Yes.

Q. Can you describe for us what that's about -- what that was about?

A. Towards the end of her employment, I would say the last month or so, it was very obvious to me that she was not trying at all at work. Repeated questions that I would have to her about what's going on or is there a problem or anything just met with silence. I felt there was no effort being put forth by her to get any better in her job at all. And I noticed -- in my desk in my office in the bottom right-hand file cabinet I kept a variety of records including personnel records. Every corporal and trooper there had a file. And I noticed that they were in disarray on two occasions when I would come back into work the next day, somebody had been in my desk. And at that time, during that short period of time, three to four days, Ms. Lancaster told me that somebody had been through her dresser drawer, rifling through it, that it was out of order. So I got some theft detection powder, is what it's called. What it does, it's invisible, but it reacts to the skin and turns the skin blue. I don't remember exactly the details, but I know I put it on a page of paper that I put the paper inside of a white envelope and put that white envelope inside of a

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manila envelope and put it in Jodi Lancaster's drawer underneath all of her personal effects and I let the corporals know that that was in there and to let me know if anything came of it. Then shortly after that, I believe it was that next night, I got a call at home from Corporal Sechoka, I believe it was, who told me that Nancy had been absent -- left to go to the bathroom or left to go somewhere and had been absent from her post and he saw her -- in the crime office there's a small sink and she was scrubbing her hands trying to get a lot of blue stain

off of her hands. And then I came into the barracks.

* * * * *

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Q. What happened next?

A. I read her her Miranda rights, advised her of the Miranda rights, and asked her what was going on.

Q. Okay. Well, what crime did you think had been committed at that point?

A. Possibly a theft.

Q. Well, what led you to believe that there had

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been a theft?

A. Because I had files out of order, misplaced in my office, and Ms. Lancaster said that somebody had been through her dresser drawer and the items in it.

Q. Well, what did you -- so you Mirandized Nancy and then what occurred?

A. I asked her questions about what had happened that evening, why her hands were blue, where she got it at.

Q. And what did she say?

A. And she refused to answer, said she wanted an attorney.

Q. Okay. And then what did you do?

A. I believe this was about eight or nine o'clock at night and I told her to take the rest of the evening off and that we would discuss whatever else might be happening the next day that she reported into work.

Q. Okay. And what happened next?

A. And she told me she was resigning.

Q. Did she ask you any questions?

A. I don't think so.

Q Okay. What happened next?

A. She left the barracks.

* * * * *

[Reporter's certification omitted in printing]

DEPOSITION OF: ERIC B. PRENDERGAST

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[page 9]

Q. Well, did you reach any conclusions based on your own observations of Nancy Suders about her ability to perform?

A. Yes.

[page 10]

Q. What were they?

A. I felt that she at times was very disorganized, easily overwhelmed when we had -- not critiçal, but when we had a number of incidents going on at the same time, she seemed to have difficulty both trying to handle communications by the telephone and then also handling the troopers out on the road.

Q. Did you discuss those feelings with her?

A. Yes.

Q. And what was her reaction?

A. Hostile to say the least. She didn't -- she usually felt a criticism or where we were trying to address the performance issues was taken by her I guess personally. She felt that it was a personal attack on her instead of that we were trying to show her ways that procedures and actions needed to be taken by her so that none of the troopers out on the road were in danger and then also, like I say, the public also, that we were performing the proper service to the public.

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Okay. Did Sergeant Easton ask you to watch Nancy Suders? Maybe watch is not the right way -- word.

A. Yeah.

Q. To observe her or to listen to her or whatever. You know, just tell me what he said or what he --

A. Would have been no different -- my recollection is that it was the same instructions that we were given for the other PCO's was -- especially the new hire PCO's, PCO Gelvin, Strait and Mrs. Suders, was to watch their performance --

Q. Okay.

A. -- engage because Sergeant Easton was the one responsible for doing their evaluations then.

Q There were times when you supervised Nancy?

A. Yes.

Q. And there were times when the other corporals would supervise Nancy?

A. Yes.

* * * * *

[Reporter's certification omitted in printing]

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[page 6]

Q. Virginia, is it -- are you retired now? Are you still with the Pennsylvania State Police?

A. I have retired.

Q. You have retired. Could you just briefly in your own words give us a description of, let's say, your

[page 7]

employment experience to include title, rank and where you work and that sort of -- worked and that sort of thing, let's say, the past five or ten years?

A. Well, in 1992 I became the equal employment opportunity officer for the state police.

Q. Okay. And when you retired, what was your rank?

A. Major.

* * * * *

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Q. Now, in the case of Nancy Suders you had made reference earlier to a conversation I believe was the word you used -- I'm not certain -- with Nancy Suders, is that correct?

A. Yes.

Q. Can you tell us what you recollect about that conversation?

A. My recollections are a little vague, but I do recall talking to Miss Suders. I recall basically that her complaint was about being discriminated against. I particularly remember the political affiliation that she said she was being discriminated against because of, and I also believed her age. I do not recall whether or not she

had also stated because she was a woman.

Q. Do you have any more information you can share with us about the issue of political affiliation; what she had to say or what your thoughts may have been as you talked with her?

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A. Well, I recall that I believe that she was the first person that I had talked to that had alleged discrimination because of that and so did ask her, you know, what that meant or why she felt she was being discriminated against. And as I recall -- and I don't recall actually whether Miss Suders actually told me this or whether I learned it later -- was because of the fact that -- the political affiliation discrimination was coming into play in that she was chosen because of political connections --

Q. Okay.

A. -- so to speak; that she was not chosen in the same way that some other police communications operators or some other employees may have been.

Q. Okay. How did she say that that connected with the problem she was having?

A. I believe she had stated that the people at the station did not believe that she had fairly gotten the job; that because of the political connection or whatever the word was that she used at that time -- I don't recall -- but because of that she was chosen rather than on merit or because she was qualified to do the job.

Q. And you had indicated that she complained to you that she was being mistreated -- I don't want to put

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words in your mouth, but about age. Can you give us more detail about that?

A. No, I can't really.

Q. Do you remember asking her how old she was?

A. No, I don't, but I would think that I would have because the age discrimination would only come into play if she were over the age of 40.

Q. Do you ever ask people when they call in with complaints for permission to tape conversations?

A. No, I don't.

Q. Do you make notes while you have these conversations going on with people who call in problems?

A. Generally I do.

Q. Do you have any notes that you reviewed for this deposition?

A. No, I don't.

Q. Do you know if there are any notes in any Pennsylvania State Police files about your conversation with Nancy Suders?

A. No, I don't.

Q. Do you remember if Nancy Suders told you that she was suffering harassment of a sexual nature?

A. No, I don't.

Q Do you recollect her talking to you about TV wrestling?

[page 16]

A. No, I don't.

Q Do you have a recollection of her talking about a -- about misconduct by certain Pennsylvania State Police troopers?

A Not specifically, you know, other than relative to being discriminated against, but I don't know if you mean any other type of misconduct.

Q. Well, did she say anything about a Pennsylvania State Police trooper who would jump up and grab his genitals or say things of a gross nature, offensive nature?

A. I can't say that I specifically recall that she said that.

Q. Okay. Do you have a recollection of giving her any advice?

A. I can't say specifically that I recall the advice I gave

Miss Suders. I can tell you what my general advice would have been.

Q. Okay.

A. I can't say that I specifically recall telling her that.

Q. All right.

A. Well, I guess I do specifically recall telling her that it would be necessary for her to file a complaint with internal affairs; that the allegations that

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she was making was against enlisted members and that for there to be an investigation done, it had to go through internal affairs; that they were the ones who would investigate any types of complaints like that.

Now, as far as the general part sometimes people or civilian personnel do not understand I guess the internal affairs process. And so I would tell them about the fact that there had to be a complaint sheet made out and tell them kind of what they would have to include in the complaint sheet. For instance, if she were saying that she was being discriminated against because of her age, you know, how was that being manifested I guess? If it was because of political affiliation, in what way did she feel that she was being discriminated against because of her political affiliation? And that those types of things should be included in the complaint because when internal affairs went to investigate, they would know what it is that they're looking at or have kind of a place to start as to what the complaint was.

Q. Well, in Paragraph 12 -- I'll read it to you -- on page five of the complaint the plaintiff alleges that you told plaintiff to get a form to fill out but refused to help her further.

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Did she say anything to you about -- do you want to take a quick look at that? It's only about a small, one-sentence

allegation. Paragraph 12.

A. (Witness complies.)

Q. Okay. Now, if I call you like she did -- if someone in the State Police called you and asked for assistance with a problem, is it the general advice you would give to get a form and fill out that form? That's what they have to do?

A. Yes, relative to internal affairs making -- doing an investigation, yes.

Q. Do you ever take information from them over a phone and process a complaint for them?

A. Generally not. I can't --

Q. Well, the reason I ask, did you ever in your career in helping people with employment discrimination problems where have you advised these people to get the form? Where are they supposed to get the form?

A. There are forms generally at the station.

Also, if a person says that they could not find the forms in the AR manual -- our administrative regulations manual -- there's a whole section on internal affairs, and there is a form in there which people basically copied and used.

Q. What do they do with the form? Let's say they get the form or they get a hold of the form

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somewhere. What do they do with it once they get it?

A. The form is submitted to internal affairs.

Q. Is there a mailing address on there? Does it go through channels?

A. I'm sure there is a mailing address -- well, I'm not going to say I'm sure there's a mailing address on the form, but I believe it's been done both ways; that it's been submitted directly to internal affairs and also through channels.

Q. So as the employment discrimination officer you don't have any authority to investigate or review discrimination?

A. Not to investigate, no. I'm not sure what you mean by review.

Q. Well, if -- if a -- I assume that it's -- that you have experienced Pennsylvania State Police history and the efforts to have the Pennsylvania State Police employ black persons, Hispanic persons and females, is that correct?

A. Yes.

Q. As someone who has witnessed that history can you tell us when the Pennsylvania State Police established an employment -- equal employment opportunity office or function; when that first came about?

A. No. I don't recall.

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Q. Was it there as long as you were with the Pennsylvania State Police?

A. I believe so, yes. Under affirmative action, though, instead of equal employment opportunity.

Q. Have you ever known that office to have the power to investigate a female being mistreated or a person of color being mistreated?

A. (No response.)

Q. Power --

A. I would say -- I would say informally. You know, it depends on what the complainant is seeking. If the complainant is seeking -- and, you know, the type of complaint that it is; how in depth of an investigation may have to be done. I mean there can always be informal inquiries made by the equal employment opportunity officer, the affirmative action officer. But at the same time, if it's a discrimination complaint that there are allegations being made against particular people and an investigation needs to be done to find out, you know, whether or not those allegations are true, then it would go through internal affairs.

Q. Do you know whether internal affairs has any female officers investigating allegations of sex

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discrimination against female personnel?

A. I know they have female officers. Whether they're specifically investigating those types of complaints, I don't know.

Q. So if I'm out there in Podunk at a rural -- I mean a lot of our Pennsylvania State Police work is done in rural barracks, isn't that so?

A. Yes.

Q. And if I'm out there somewhere in a rather isolated barracks and I'm a female and I have problems with harassment by Pennsylvania State Police officers, males -- young males -- I fill out a form which goes to internal affairs, and internal affairs investigates that activity?

A. Yes.

Q. And you as the discrimination officer do not investigate that activity?

A. No, I do not.

Q. Have you ever had anyone call you with a complaint and felt strongly enough about it to become involved in investigating on your own -- following up on the comment you made about informal, investigating on your own or getting involved in the investigation process to see where it was going and what was happening with it?

A. Well, like I said generally it would be up

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to the complainant relative to what course they wanted to proceed. If they wanted it handled informally -- I can't think of a real good example now, but just someone who's saying, I think this person is discriminating against me because I'm a woman, but I'm not sure or, you know, something that doesn't seem to be to the complainant a very serious matter, then, you know, there may be something done informally by speaking with the -- the troop commander or someone in that person's chain of

command. But, again, like I said if there's going to be an investigation and there are allegations made against people and it's -- and it requires I guess an in-depth investigation where people are going to have to be interviewed and statements taken and witnesses, then, yes, it would be done by internal affairs.

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Do you recollect how troopers -- I think you mentioned a manual -- troopers are -- how they are

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informed about your services; the services that you provide? In other words, what does the State Police say to the average working trooper out there about their rights and their access to the position that you held?

A. Well, again, talking about the administrative regulation manuals, there was a section in there that covered the equal employment opportunity office. There were posters about equal employment opportunity at the stations. I took part as the equal employment opportunity officer in some of the supervisory training, some of the PCO training and talked about the equal employment opportunity office. So that's one of the ways that people were advised of the position.

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Q. Okay. Fair enough. Now, the average member out there would have ready access to your name and to the nature of your duties, and that would be in those regulations and might even be posted elsewhere or be brought up elsewhere?

A. Yes.

Q. And is it fair to assume that --

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(Discussion held off the record.)

BY MR. BAILEY:

Q. Is it fair to assume that you assumed when Nancy Suders called you that, you know, she got your name off of something that was posted somewhere? Maybe someone could have told her of course, but from that -- from the regulations?

A. Yes.

Q. Okay. And do those regulations as you remember them or you recollect them, do they tell people what their rights are?

A. Yes, I believe so. Not only then in the regulations about equal employment opportunity, but being a civilian employee there were also regulations pertaining to civilian employees and what their rights were.

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Q. Did anyone ever say to you, I'm afraid to go looking for a form or I'm afraid if I ask for a form, you know, somebody might do something to me? Never had that experience?

A. I don't recall anyone saying that they were afraid to look for the form. I've had people say that they did not want to submit it through their chain of command. And I've told people that they could send it to me, and I would forward it to internal affairs or that they could send it directly to internal affairs. And if I had talked to them, I would let internal affairs know that such and such a person was submitting a complaint.

* * * * *

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A. To have an investigation done by internal affairs there has to be a written -- I don't know that it's called a request, but an allegation filled out on a form and submitted to internal affairs, yes.

Q. It has to be in written form submitted on that form? Or I suppose somebody could send internal affairs a letter, and they'd act on it or something like that. I don't imagine that they would have to do it on this particular form.

A. Well, even -- even -- and I'm not sure about within the department, but I was going to say if someone from the general public were to send a letter to internal affairs, they would send them a form to fill out to be sent back making -- you know, making the complaint. I believe it was called a complaint verification.

Q You don't take any anonymous complaints?

A. Yeah, they do.

Q. They do. Have you ever taken an anonymous complaint?

[page 40]

A. Not that I can recall.

Q. Have you ever during your entire tenure as affirmative action employment discrimination officer with the Pennsylvania State Police ever submitted a complaint to any bureau or person within the Pennsylvania State Police on your own or has it always been a situation where, go and fill out a form?

A. As the equal employment opportunity officer I do not recall filling out a complaint sheet for anyone. Like I said I have talked to people about their complaints. I've had complaints sent to me and discussed it with the complainant as to what they had included. And like I said, you know, in trying to give them some guidance on

how the complaint should be worded, you know, so that they're showing how they're being discriminated against, have discussed with them -- sometimes even before they've submitted it to me -- how to write up the complaint so that they're kind of covering their bases as to what the allegations are and, like I said, how internal affairs is going to proceed to investigate the complaint and then submitted it to internal affairs.

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BY MS. YERGER:

Q. You talked about the administrative regulations. Where are they located? I'm not sure that
you told us that.

A. Okay. Each station -- well, there are two binders of administrative regulations, and they're referred to as AR 1 and 2. And they're at each station. Generally like a station would have a library, and then there's usually a copy like maybe in the sergeant's office, lieutenant's office, captain's office.

Q. And parts of the manual are posted?

A. Not regularly, but there may be. If specific attention -- if they want to draw specific attention to maybe something new that's being issued or that they want to make sure that everyone sees, they will sometimes post it or bring it to the attention of people at a class.

Q. The sexual harassment policy is part of the

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AR manual?

A. Yes.

Q. Is this sexual harassment policy posted?

A. It has been.

Q. In the barracks?

A. Yes.

Q. Do employees sign for the sexual harassment policy; basically sign that they read it?

A. If I recall correctly, during the time that I was there there were some changes made to the sexual harassment policy. Like I said I believe that it went out per capita to each employee, but also that it was supposed to be posted on bulletin boards. And what they do is they have just a check-off list with everyone's name from the station on that list. Then as you read it, you're supposed to check off that you did read that policy.

Q. Okay. I just want to go over the allegation. It says that on -- in the complaint it says on or about August of 1998 Miss Suders called you. Does that sound about right; August of 1998?

A. I really didn't remember the date.

Q. Okay. That's fine. Then the next allegation is that you told Miss Suders to get a form to fill out but refused to help her further.

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Do you agree with that statement?

A. No, I don't. I just -- generally I cannot believe that I would have refused to help Miss Suders. I may very well and probably did tell her about filling out the form. But I don't believe that I refused to help either in discussing what the complaint should be, the allegations or giving assistance in filling out the form or telling her where to get the form.

* * * * *

[Reporter's certification omitted in printing]

DEPOSITION OF: NANCY DREW SUDERS

* * * * *

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Q. Let's go back to the state police was trying to prevent you from getting hired.

A. Uh-huh.

Q Did you hear anything -- what did you hear that suggested that was the case? Why do you think that?

A. Well, the sheriff told me from the beginning when he found out that I had applied out there, he told me -- he said that -- well, they had a list of names. And on the list was my name of people who had -- apparently had applied or whatever. And he knew before -- well, we didn't know at that point that I would be hired, but my name was on a list. And he saw the list. Jody Lancaster had this list of people who had applied for this job, and he saw my name on the list. And he told me from the beginning -- he said, they don't want you out there. He said, they're -- they don't want you. He said, you know, you shouldn't go out there. That's what he kept telling me. I said, well, I have to -- you know, I applied, and I want a chance.

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That's all I wanted was a chance. And so then -- do you have a question?

Q. No. Keep going, please.

A. So then Mike Fix called me one night, and he said, Nancy, he said, who all did you put down for references. And I gave him the list of references. And -- now I filled out another application besides this, and I took it along with me to the interview. Now, I don't have a copy of that. But on this application it's Brenda Knepper -- she's district justice -- Dwight Harvey, Fulton County District Attorney; Bonnie Keefer -- Bonnie Mellott Keefer, Fulton

County Treasurer. On my -- on the application I gave to the state police I also had Mike Fix -- he's the Fulton County Republican Chairman -- Sue Yeager. She's the aide to Representative Dick Hess. And I had Gary Decker, Fulton County Commissioner. That was on my additional list. Mike called me after the interview, and he asked me -- he says, Nancy, I want a list of all the references. So I ran down the list. None of them had been called. But the Governor's office had told Mike that they had information -- I assume from Easton -- that none of my references were any good. But none of my references

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had ever been called. Mike sent that list to Harrisburg, and they took over from there.

Q. Had you spoken to any of the references to find out for sure?

A. I know everybody. Mike knows everybody. Mike contacted everybody. We knew that they had not been called.

Q. Okay. Let me step back for a second. The sheriff said you shouldn't go out to the police barracks. Did the sheriff -- you worked for the sheriff?

A. Uh-huh.

Q. You did a lot of work for the sheriff?

A. Well, I worked for the sheriff.

Q. But you just said that you were probably in the office more than he is?

A. Probably. The sheriff's out serving papers.

Q. Right. Did the sheriff indicate to you why he didn't want you to go other than the fact that he was losing an employee?

A. No -- definitely. He said everything he heard from the troopers were negative reports. They didn't want me out there, and that's all there was to it.

Q. Okay.

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A. He told me that they knew that -- he said -- he kept telling me -- he said, they don't want you because you're a political appointment. I kept telling him I was not a political appointment. All I did was fill out an application. I never asked anybody to get me that job. I filled out that application. And he said, they're all against you because of politics. I said, that's not fair. Everybody has a right to go to a job and do that job to the best of their ability without being harassed.

* * * * *

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Q. Who was your supervisor?

A. Whichever corporal was on duty at the time. I don't recall who was there, if that's what you're asking.

Q. In general who was your supervisor that you reported to at the barracks?

A. Whoever -- whichever corporal was on duty.

Q. Okay. When did you have PCO training at the academy?

A. In June of '98.

Q And how long did that last?

A. Two weeks.

Q. And that was approximately two months after

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you were hired? Two to three?

A. It was the third month.

Q. Okay. And how long did the training at the academy last?

A. Two weeks.

Q. Okay. Now, you've told us in your complaint that there was a series of different kinds of harassment. When did that harassment start?

A. Approximately a week and a half to two weeks after I was hired.

Q. Okay. And what's -- tell me what the first incident of harassment was.

A. Generally, they -- well, they just started telling me that I didn't do things right.

Q. Who's they?

A. The -- whoever the corporal would be on the station. And I would do whatever he said that I should do. I would listen to whatever he was telling me. And I would try to do it the way he wanted me to do it. And then at the same time Corporal Baker approximately at the same time started doing his wrestling moves.

Q. Okay. So this was --

A. Approximately a week and a half to two weeks after I started.

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Q. Okay.

A. I --

Q. Did you -- were they any employees --

MR. BAILEY: I think she was going to respond further.

BY MS. YERGER:

Q. Yeah, please. I'm sorry. I cut you off.

A. That was when I was put on my own without any other PCOs or -- around.

Q. So when you first started, you had another PCO working with you?

A. Uh-huh. Yes.

Q. And then you were given the assignment by yourself?

A. Uh-huh. Yes.

Q. And then --

A. Then it started.

Q. Okay. Complaints started that you were doing things incorrectly?

A. Right. The harassment started.

Q. I guess I just want to talk about the harassment in every form; the complaints about you not doing things correctly. You've already told us about Corporal Baker, and we'll get back to that. What other kinds of things were going on

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from the very start or from a week and a half in?

A. Well, they just -- like I said, it didn't matter what I did, I couldn't -- it wasn't done right. I didn't answer the phone like I should. I wasn't talking loud enough on the phone -- on the radio. I was talking too softly. It was just -- for eight hours according to them I just could not do anything right.

Q. Okay. Tell me about the age discrimination.

A. Sergeant Easton would come out to the communications room, and he'd go -- I'd be sitting at the desk and doing my work, and he would go -- come in to get something out of a file or he would go to the copier. And the first thing he would say -- he'd say, it's getting old -- it's awful getting old, isn't it, Nancy. I wouldn't make any response to him.

Q. Anything else?

A. That was just a constant. He would say things like that to me. And they had a birthday list they had posted on the bulletin board. It had everybody's birthday on there except mine. It had my name on there, but they didn't have when my birthday was. And then one day -- it was in May -- Trooper Kagarise, he called me. And he wanted me to get his --

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his birthday list out of his mailbox. It was called a mailbox. Everybody had a mailbox where you got your -- you received your checks and you kept papers in. And I went, and I got it. He held on the phone. And he wanted to know who all had a birthday in the month of June, and

I read that off to him. I checked the list for him. And he made a remark that Trooper -- he was going to bake a birthday cake for everybody whose birthday was in June. But Trooper Culler, he don't want any birthday -- he didn't want a cake. And so I did that for him. I told him who had their birthday in June. And I noticed on his list my name wasn't on his list either. So apparently they had -- everybody had lists of people's birthdays, and my name -- my birthday was not on anyone's list. And that was humiliating. I mean they had this posted on the board where everybody could see, plus they must have handed out copies of it. And it was degrading. And then when Easton went on to talk to Mike Fix, he made a remark that a 25-year-old could catch on faster than I could. It was a terrible feeling to know -- that's all he wanted to talk about was my age; make fun of it.

Q. How else did he make fun of your age?

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A. He basically would just come in there and just say things like that to me. And it wasn't just once. It wasn't offhanded. It was -- it was mean, spiteful. And he'd expect an answer, and I wouldn't answer him.

Q. Did you ever tell him that it bothered you that he was saying that?

A. No. I was afraid of him.

Q. What other kinds of things -- you told us about some age. Were there any other age comments that were made that bothered you?

A. Corporal Baker would call me momma. He asked me one time how long I'd been married, and I told him that I'd been married at that time 38 years. He says, well, I can call you momma then. And I wasn't his mother. And he -- here he was the supervisor. He's making fun of me that I was his mother? And PCO Robert Strait was there too. He was laughing too about it. Then one day I had to take some letter -- before I -- I always had to get all my work done which I did before I went home. And there was

some letters there that no one had put in the mailbox. And I told him that I was going to take them out to the mailbox. And he said, okay, momma. I mean I

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was not his mother.

Q. Okay. What about -- there were some allegations about sexual comments that were made. Can you tell me about those that you recall?

A. Who do you want to talk about?

Q. Everyone. Everything that was said to you that you determined was sexual or sexually harassing.

A. Easton, every time I'd go in his office, it didn't -- it didn't matter why I was going in there. He would bring up this business about people having sex with animals. He would say, you know people have sex with animals. And I wouldn't respond. I wouldn't say anything to him about it. I wouldn't give an answer I guess you'd say. And he would just bring it out -- just out of the clear blue sky. He'd talk about sex with animals. Apparently he had a fetish with bestiality or something. But that's all the man wanted to talk about. And I heard him -- on different occasions he liked to talk about sex. I would try to ignore him, but he would just keep it up. He would come out to that communications desk, and he liked to wear Spandex shorts. And he'd come out to the communications desk, and we had chairs with rollers on. And he would sit down

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on the chair, put his hands behind his head and spread his legs apart. Every time he'd come out to the communications desk, I would get up, get away from him and stand at the desk or on the other side of the desk. It had about a four foot high desk in front. I'd busy myself someplace else, but that's what that man would do.

Q. Why would that offend you?
A. Because you could see his crotch.
Q. Okay. Did you ever tell him that you were bothered --
A. I didn't --
Q. -- by this or any -- any of the comments?
A. I didn't tell him -- I was afraid of him. I-- I didn't tell him that it bothered me he would sit there and do stuff like that. But it did bother me. It embarrassed me. And I didn't know what to do about it to make him stop. He told me how he had friends in Harrisburg; no one could touch him, it was my word against his word, he had enough military time that he could retire now. He told me that before I even got there. I had a meeting with him, and he told me that he wasn't afraid of anyone.

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Q. What was the context of that meeting? Before you started work you met with him?
A. I had to go out there. He wanted to talk about some papers work. I had some papers, something -- I don't even remember what it was, but I filled out something or other. And he told me he had some concerns about me. He never said what kind of concerns. And he said that -- and I said, well, I can do the job. And he said -- he said, no one can touch me. He said, I have friends in Harrisburg, I know the captain and anything you say is going to be my -- your word against mine.
Q. What was the context of a situation like that? Did you -- I guess I'm trying to understand why somebody would say that.
A. I can't explain why the man said that unless it was to intimidate me. And that's what I figured it was. He was trying to intimidate me and keep me -- I don't know what -- under his control or something; let me know that he had friends in Harrisburg and he was -- that I was just somebody who they weren't going to pay any attention to. I imagine that's what it was.

Q. Why --
A. I can't get in his head. You'll have to ask

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him.
Q. Why -- explain to me why -- was there a relationship between the two of you?
A. Absolutely not.
Q. A relationship like a friendship or an acquaintanceship.
A. No. No. I knew who he was. He might have been in our office once before that, but I didn't -- I didn't know him.
Q. Okay. Let's get back to other comments that were made either by him or any of the other defendants or anyone at the barracks.
A. Well, he and Trooper -- or Corporal Prendergast, they were having a conversation about sex. And Easton, he said about -- he said, well -- he said, if someone had a daughter, he said, I think they ought to teach her how to do -- give a blow job.
Prendergast, he starts laughing about something like that. And Easton said, I'm serious. He said, I think you ought to teach her how to do a good blow job. I got such a pain in my chest to think anybody in authority like this would suggest abusing a child like that.
Q. Okay.

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A. I don't know if you -- have you ever listened to a child testify on a stand how they've been abused by their father or brother or uncle? Have you any idea what that does to a child?
MS. YERGER: Should we take a break?
MR. BAILEY: Want to take a break, Nancy?
THE WITNESS: No. I'll be all right.
MR. BAILEY: I know it's difficult. Why don't you just

-- if you need a break, just say so.

BY MS. YERGER:

Q. Just let me know. Other conversations that were made?

A. It's just this constant sex with animals all the time he wanted to talk about. And I was afraid -- every time I went to his office I was afraid because -- and he had a couch there. And he would shut the door. And I would sit there at the end of the couch. Between me and that door was a stamp machine on a stand. I would sit at the end of that lousy couch so that he couldn't get that near me and -- because I was afraid of him. He'd pull his chair over, and he would -- he would just leer at -- just look at me. And he'd start this lousy sex with animal story. It didn't have anything to do with anything.

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But he would come in, and he'd just start this garbage.

Q. Were you afraid that he was going to make sexual advances?

A. I didn't know what he was going to do to me. I guess I was afraid.

Q Did he ever make sexual advances?

A No. I stayed away from him as far as I could. I guess he was trying to -- I don't know -- see my reaction.

Q. Would you consider it flirting?

MR. BAILEY: I object to that. You can respond. You can respond.

THE WITNESS: I don't know. I don't know.

BY MS. YERGER:

Q. I'm just trying to get to the nature of why she's feeling so -- why she's feeling the way she felt with him; an explanation.

A. As to -- I was afraid of the man. The man told me -- he told me not too long after I got there that he would do anything for PCO Jody Lancaster. He said, I'll wash her car if she wants me to. And he says, if anybody does anything to Jody Lancaster, he says, I'll take them out

back, shoot them in the head and bury their body where nobody can find

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it. That man told me that. I knew he was dangerous. He told me how he was on a cert team and all he'd have to do was just give the signal. He could be standing there talking to somebody, and he could give the signal and his sniper friend would kill them.

Q. Okay. Other comments?

A. I was sitting there -- it wasn't too long after I got there, and I was still -- because I was still working with another PCO. And it was within the first probably week or two. And PCO Stacy Gelvin, she had a real short dress on. It was a flouncy type dress; flowery in color and scoop neck. And when she sat down at the communications desk, of course it would hike up. And he came -- he came in, and he said to her -- he said -- he said, you mustn't be wearing Victoria Secret nylons, he said, because yours has a run in it. Then she started picking at her leg, you know.

Q. Other comments?

A. Probably that's about all from him.

Q. Okay.

A. Do you want to talk about Baker --

Q. Sure.

A. -- then? Right after I got there --

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probably after I was started being on the desk by myself -- Baker started doing this wrestling move. He would come in. He wanted to talk about wrestling. I wasn't into wrestling. Baker, he gave me the nickname of Nancinator. That was my wrestling name he said. And he gave Stacy Gelvin the name of Momma G. And his wrestling name was The Corporal. And he would talk about wrestling. Then he would do this wrestling move

where he would cross his hands, grab hold of his private parts and yell, suck it. The man did this, and he would beat on it. He would beat his hands on his crotch too and yell suck it. He would ask me to do this garbage. I told him he'd never see me do something like that. And then apparently -- and there was also a wrestler that yelled, hell yeah. He would come in there and yell that. And he'd tell me to yell hell yeah, and I would refuse. One -- I told him -- I said, I don't think you should be acting like this. And he said -- this one night I said, I don't think you should act like this. I was so sick of it. It was a daily thing. Well, every shift that I worked with him it was. And he would do this five, ten times a night.

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This one night he had been doing it and doing it. And I said, I don't think you should be doing this. And he said, well, I'll do it for the captain. With that he grabbed the straight back chair, pulled it probably maybe -- maybe five feet from where the communications desk was in the middle of this communications room, jumped up in the chair and he does this lousy move. And, you know, he's grabbing his crotch, he's beating on his crotch and yelling suck it. So I knew I couldn't go to Captain Holmberg because apparently Captain Holmberg liked it too. I mean the man wouldn't stop.

Q. Were you familiar with what he was doing? Did you know it was a wrestling move?

A. He told me it was.

Q. You supplied --

A. I don't watch wrestling.

Q. You supplied a photo with your document --with my document request to you, and I want to show that to you. I don't have -- there you go. Was that photo supplied with your document request?

MR. BAILEY: I think I supplied it.

MS. YERGER: Okay.

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BY MS. YERGER:

Q Have you seen that before, Miss Suders?

A Yes.

Q Is that the move that Corporal Baker would do when you say X motion?

A. That was -- that would be the beginning of his move. His move went on down, and he grabbed his genitals when his hands went down.

Q Okay. So his hands were lower than --

A Yes.

Q Okay. And you said that he would grab his genitals and beat on his genitals?

A Yes. He would pound on it and -- yes.

Q You didn't explain it that way in your complaint.

A. Well -- well, he would grab --

MR. BAILEY: Is that a question?

MS. YERGER: Yes, it is a question.

BY MS. YERGER:

Q. Why didn't you explain it that way in your complaint?

A. It's hard to explain in a complaint --

MR. BAILEY: Nancy, I composed -- I'm her attorney. I composed the -- reviewed these materials and composed the complaint for her. I'm going to object to

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that question. I'm going to let you respond, if you understand it. But a complaint under Federal Rule of Civil Procedure 8 which requires --

MS. YERGER: You don't need to give me some law, Don. Thank you, though.

MR. BAILEY: Pardon me?

MS. YERGER: I don't think you need to give me some law.

MR. BAILEY: Then you don't need to ask questions like that.

MS. YERGER: Okay. I'll withdraw it.

MR. BAILEY: This is difficult as it is. There's sensitivities in doing this kind of work which you know, and the lady's very upset.

MS. YERGER: I can see that, and I understand that. My intention is not to make her upset.

MR. BAILEY: Please respect it. Thank you.

MS. YERGER: I want to understand. That's all.

MR. BAILEY: Thank you.

BY MS. YERGER:

Q. Okay. You've told us that Corporal Baker would do this frequently?

A. Yes.

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Q. And can you give us an idea of how frequently?

A. Probably five to ten times a shift. All he wanted to do was play with his crotch. That's what it amounted to.

Q. When you say taking his genitals in his hands which -- it was part of the complaint -- I -- and I understand that to mean grabbing himself?

A. Yes. When his hands would go down on him. He would spread his legs apart. And when he spread his legs apart, then his hands would be further down than what that picture is.

Q. Okay. Did he do -- did he do that every time as well?

A. That's what he was doing every night -- or every shift.

Q. So he wasn't doing -- just doing the X motion every time, he was also grabbing every time?

A. Well, sure -- yeah. That's what -- I think -- well, I don't know. Maybe he improvised and put his own moves in with it. I don't know. I don't know watch wrestling.

Q. That's was my next question. You're not a wrestling --

A. I don't watch wrestling.

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Q. You've never watched wrestling?

A. A long, long time ago. Maybe 30 years ago or something. I don't watch wrestling.

Q. Did you tell Corporal Baker that you were offended when he was doing this?

A. Yes. And that's when he jumped on the chair.

Q. Did you tell anyone else that you were offended when he did this?

A. On the station?

Q. Yes.

A. No.

Q. You also tell us in your complaint that there was a picture. Is that the picture from the complaint that you were referring to in the complaint?

A. That's a picture that was on the -- above his -- beside his desk.

Q. And just so I get an idea of where on the desk the picture was.

A. Well, it was on the bulletin board beside the desk.

Q. Okay.

A. Right beside it.

Q. It wasn't at a locker?

A. No.

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Q Did you ever point out the picture to anyone and say you didn't like it or you were offended by it?

A. No. It wouldn't have done any good. You already had him moving -- making the move.

Q. And it was that exact lower picture or was it all three of those pictures?

A. He jumped -- he did a lot of jumping around too. But the move he was doing was the bottom move, but he rubbed -- he would rub his rear end and say, I have a nice ass, don't I? I didn't respond to that either. He -- he rubbed himself.

Q. Okay. Maybe you didn't understand.
A. That's not a wrestling move, but he did that too.
Q. Maybe you didn't understand my question. Were all three of those pictures posted? When you say that there was a posted picture at his desk, were all three?
A. Right. Yes.
Q. It was all three of those?
A. Yeah.
Q. Okay.
A. Yes.
Q. How are those pictures sexually offensive to

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you?
MR. BAILEY: Well, first of all, let me place an objection. I don't know that she ever indicated it was sexually offensive. That's assuming a fact or testimony certainly not in evidence.
MS. YERGER: Well, that's in the complaint under the things that --
MR. BAILEY: The question is, how are those offensive to you. That's fine.
THE WITNESS: I find it offensive because I had to go into that corporal's room. Even when he wasn't there, it still reminded me of what he did when he was there.
BY MS. YERGER:
Q. Okay. Other things that --
A. He kept it in my mind constantly.
Q. Other things that Corporal Baker did?
A. He rubbed his rear end, like I said before. And he came in one -- one day I was at the communications desk, and I was working with Robert Strait. And it was just about time for the shift to end, but everything had to be taken care of before you would leave. Baker came in probably maybe quarter till 3:00. And he was just wearing -- he was wearing a pair of shorts and T-shirt like he came to work most of the time.

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And I said hello to him and asked him how he was to, you know, be polite. And he said, oh, my back hurts and all this. And Robert Strait was at the communications desk with his back to Baker, and he was at the computer finishing an incident. Robert Strait said, Bake -- that's what he called him; Bake. He said, can I rub the hair on your legs? And Baker said, oh, Bobby. He said -- he said, my back hurts, do you want to rub my back. No, I'll come rub your back. And he comes over to Robert Strait. He starts massaging Robert Strait's back, his neck and saying amorous things like, oh, Bobby, what big strong shoulders you have and just kept rubbing him. And I was at the -- I was there at the -- taking care of the press releases to make sure they were taken care of. And I said, I don't think you should talk like that. And Baker turns around to me. He says to me -- he says, what's the matter, don't you like gays? Well, there was no yes or no to that. Then he went on to say, well, I think Bobby ought to get take -- get special treatment. And, you know, what's the response to something like that? I couldn't give any kind of response, and I didn't. I didn't give any kind of response.

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And Baker was still standing there. While he's telling me about didn't I like gays, he's still rubbing Bob Strait's neck and back.
Q. Did you find that offensive?
A. Yes, because if they -- if they were sweet on each other, that's fine, but they didn't have to do it in the communication room.
Q. You didn't -- you could not have interpreted that to mean something other than they were sweet on each other?
A. I don't know what to say to that.
Q. Okay.

A. I've never seen one man rub another man.

Q. Other incidents of harassment involving Corporal Baker.

A. Baker --

MR. BAILEY: I'm sorry. Corporal Baker did you say?

MS. YERGER: Yes. Corporal Baker.

THE WITNESS: It was -- I believe it was -- anyway, he -- I'm not sure if it was the same night or not because, like I said, you had to clean everything up there. Some nights I didn't get out of there -- or days didn't get out of there exactly at 3:00 o'clock because you had to have everything taken care of.

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Baker started talking about how he was going to get his penis pierced and his wife was going to get her nipple pierced. They were going to do this for their anniversary. Well, what kind of response is that -- would I make to something like that? It was so humiliating to hear a grown man tell this stuff. I couldn't -- I couldn't stop him. I mean, if he wants to do that sort of thing, he can keep that private. I don't need to know it.

BY MS. YERGER:

Q. Did he tell you that?

A. Yes.

Q. No one else was in the room?

A. No. Bob Strait was there. I think it was the same -- I think it was all took place the same day because I was still standing -- I remember where I was standing. I was standing at the communications desk. And I think he left Bob Strait then. Then he starts talking about what they -- him -- about his -- him getting his penis pierced and his wife's getting her nipple pierced for their anniversary. Now, I don't know when their anniversary was. Maybe he was just saying that. I don't know. But he's telling me and he's telling Bob Strait too. Bob Strait's listening to it.

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Q. Do you remember when it was?

A. I don't have the exact date in my mind at the moment.

Q. Did you tell him that you didn't like him making those comments in your presence?

A. I'd already told him about the wrestling move. What good would it have done? I mean --

Q. Did you tell him --

A. I told him about rubbing Bob Strait, but I didn't tell him I didn't like the rest of it about the penis and the nipple piercing. I didn't tell him that.

Q. Did you tell --

A. I already told him once that -- that I didn't like him talking and rubbing Bob Strait and saying amorous things to him.

Q. Okay. So let me get this straight. You didn't make a comment to him after the comment about the penis?

A. No. It wouldn't have done any good. He didn't care.

Q. Did you go to anyone else and tell them that you didn't like those comments?

A. They didn't -- there wasn't any reason -- there was no one on that station that I could go to. I had a sergeant there who was talking about abusing

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children and bestiality. There was no way I was going to be able to tell him. There was nobody.

Q. Did you go anywhere outside the station to complain about these comments?

A. I had talked to Mike Fix and Chris Davis about what had been going on there at the station. I told them about Baker's move, and they were relaying this information to the Senator's office.

Q. Did you go to anyone in the Pennsylvania State Police to complain about the actions of -- that you just told us about?

MR. BAILEY: You mean aside from the -- the ones she's already testified to?

MS. YERGER: You mean -- no. She just testified --

MR. BAILEY: Besides complaining to Baker?

MR. YERGER: Oh. Besides complaining to Baker.

MR. BAILEY: Yeah. I mean he was a supervisor. That's all I'm saying. You mean outside of the station there?

THE WITNESS: I went to Virginia Smith Elliott eventually.

BY MS. YERGER:

Q. Okay. We'll go back to that. Tell me about

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any more comments that were made.

MR. BAILEY: By Baker or do you mean somebody else?

MS. YERGER: I don't know if we're done with Baker or not.

BY MS. YERGER:

Q. You'll have to help me with that.

A. Right at the moment I guess -- I guess that's -- we're done with Baker. I don't -- I ean't -- I don't know.

Q. Okay. Anyone else direct comments that you thought were sexually or otherwise harassing?

A. Not sexual.

Q. Okay.

A. No one else did sexual harassment.

Q. There were no other sexual comments by anyone?

A. No.

Q Any troopers?

A. No.

Q. What about other comments that you thought were harassing, whether it was because of your age or because of your political affiliation?

A. Prendergast pounded on me at every shift.

Q. Pounded? By --

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A. By -- verbally. And he had been a -- well, had even asked Easton, did you assign Prendergast to me, because it was so obvious. Prendergast, I feel sure that he even changed shifts -- shifts were changed so he could be on the 3:00 to 11:00 with me. And Prendergast just kept at me day after day. It didn't matter what I did. He called me a liar. And that -- well, that's another thing about Easton. Easton told me that the village idiot could do my job. He insinuated -- I don't know who -- I don't know who this village idiot was because I didn't know any. But Apparently Easton did because he had this village idiot that could do my job better than I could. I was told that numerous occasions. But Prendergast, he would tell me I was a liar and he was going to watch me. He was going to watch me every shift the whole time.

Q. Was he going to watch you because he --

A. He didn't trust me. He was going -- and I was a liar.

Q. What didn't he trust?

A. He just didn't trust me. He just -- he didn't trust me. He kept telling me he didn't trust me. I -- he -- oh, Easton and Prendergast both told me that the troopers are in fear of their life.

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I mean I was a deputy sheriff. I mean I don't know how I was going to endanger their life, but he just kept telling me he was going to watch me. He would go into that corporal's room. He would pull that chair over there to that doorway. There's a doorway in the front of him and in back of him. He would sit there and turn the TV on. And he would sit -- it was just a straight shot just like that window is. I would sit there at the communications desk, and he would watch and he would watch me. I guess he kept one eye on the TV and another one on me. I think the only time the man got up was maybe when he

went to the bathroom or to get something to eat. The man would watch me.

Q. And you considered that sexual harassment?

A. No. I just -- I consider that downright harassment because he just kept at me.

Q. And --

A. I don't know -- I don't know -- I don't know the legal terminology of sexual harassment, but that was harassment. The man wouldn't let me alone. He would watch me.

Q. Was he giving you reasons for -- like if he would give you a -- if he would tell you you were doing something wrong, would he then explain how to do it right?

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A. No. He would -- every time I'd ask him for help, he would say, you've been showed that, you've been showed that. He would not help me.

Q. Did anybody help you?

A. Not any more than they had to. I would ask for help. It was amazing. There's a corporal -- corporals apparently didn't know how to do anything because they would just bluff me off and mumble, oh, you ask so and so when he comes in on shift. That's the kind of response I would get. I had a trooper one night. He helped me at the desk. He was -- for some reason he was assigned to the desk. Once in a while there would be a trooper that would be assigned to the desk. I don't know what for or what reason. And he helped me one night. And I knew him from -- he growed up in McConnellsburg. He knew my family. And after the shift got over I thanked him for helping me. And I told him -- I said, Brent Jessick, you are a good teacher, you ought to teach. Oh, no, no, he said. And I can't -- I wish I could, but I can't remember who else was in that communications room that night because I thanked him for helping me and being a real good teacher.

* * * * *

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Q. Okay. What other incidents that you considered harassment happened involving anyone?

A. Prendergast. Prendergast would come out there on different occasions, and he'd have his -- he would be maybe going out on an incident or something a couple times that it happened. He -- he was going out. I

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don't know what he was doing, but he would come out at that communications desk. He would put a pair of black gloves on. They didn't have any fingers in them. He would stand -- like this was part of the communications desk, and of course they ran like that. At the times it happened I was sitting here at the computer. He came to the -- should I stop talking?

MR. BAILEY: Thank you.

BY MS. YERGER:

Q. Please continue.

A. But he came out to the other side of the communications desk, and he had these black gloves on. And he started doing this (indicating). And he would hit, and he would hit on the other side of this communications desk at me. He'd just stand there and do that.

Q. Was he staring at you while he was doing this?

A. Yes. He would stand there, and he would do this (indicating). That was intimidation. Like he had a reputation of beating up on people, and it was -- he was trying to -- he was threatening. I was -- I didn't know what he would do. He would walk around, and he would portray himself as this Nazi. And one day -- one evening Trooper Sechoka

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-- or Corporal Sechoka, he was sitting there at the doorway there. I could see him. Prendergast was going back through from -- he had gotten something off of the top of the desk. He was walking back through. And he reminded me of the tank commander in The Longest Day. He would stand up real straight with this hateful look on his face. And Corporal Sechoka said to him -- he was looking at him. And he said to him -- he said, you remind me -- and he said a curse word -- of a storm trooper or Nazi. And Prendergast laughed. He said, I've been told that many a times. And he started telling this story how when he was stationed out near -- I think it was Philly -- Smithport -- how he went into this woman's apartment one night. She went into the bathroom, and she locked the door and crawled into the bathtub and pulled the shower curtain. And when he knocked the door in, she told him he was a storm trooper. And he laughed. He said she even told that in court; how I was a Nazi and I was a storm trooper. He was proud of it. He was proud that he could go and intimidate people like that.

Q. Did you ever tell Sergeant Easton about Prendergast's actions in terms of hitting his hands?

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A. Easton -- Easton assigned Prendergast to me. I even asked Easton if he had assigned him to me. And I said, did you assign -- assign Prendergast to watch me or -- no. I said -- that's not the way it was. I said, did you -- is Prendergast assigned to me? I knew he had been because he was the one who kept this constant harassment up. He said, well, now, who would do that --

Q. Did you --

A. -- in a manner that dared me to say, well, you. I mean I was afraid -- I was afraid to say that.

Q. So the answer to my question is, no, you didn't tell Easton about hitting his hands?

A. That's right. Wasn't any use.

Q. Did you tell anyone outside of the Pennsylvania State Police barracks who was a member of the Pennsylvania State Police barracks? I'm sorry. Let me rephrase that. That didn't come out quite right. Did you tell anybody else in the Pennsylvania State Police outside of the McConnellsburg barracks about what was happening to you?

A. Concerning who?

Q. Concerning Prendergast hitting; concerning, you know, some of these other comments.

A. When I called Virginia Smith Elliott, I told

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her a lot -- a lot of this.

Q. Okay. We'll get back to that conversation with her in a minute. So you told her about that?

A. I told her. Of course I was telling my husband.

Q. Okay. Other comments that were made to you that you found were sexual or age or -- sexual harassment, age harassment, discrimination.

MR. BAILEY: Could I -- I'll object to the form of the question. If there's a legal definition to those things, of course, you know --

MS. YERGER: Of course. I can rephrase it.

MR. BAILEY: Yeah, because, you know, asking her to discern what is or is not this type of harassment, that type of harassment --

BY MS. YERGER:

Q. Other comments that were made to you that were offensive.

A. It was offensive -- it was offensive to me every time when Prendergast would call me a liar. Prendergast, he accused me of taking home the accident file. Baker had started accusing me, and that wasn't true. And then Prendergast started one night; told me he wanted to talk to me in the corporal's office and --

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after roll call. I thought what's he going to do to me tonight. And I went in there, and he started telling me that I -- he accused -- started accusing me of taking the accident file home. I said, I would -- I didn't do that. I said, Bob Strait was there when you found it. I said -- I said, that's not true. And he started telling me that Jody Lancaster had told him all this stuff, and I said -- I said, you bring your polygraph people down here. I said, I'll take a polygraph, and she can take a polygraph. He said, well, what's that going to prove? I said, you're going to see who's lying. I was still thinking at that point that somebody on this station was decent and honorable maybe enough to get the truth. And it wasn't the case. And I told him -- I said -- you know, he's standing there telling me I'm a liar and he's going to watch me? And then he tells me -- he said, we all know how you got your job. He said, you're the last political appointment. He said, and you're going to have to work through this with the troopers. Well, I knew where that was coming from. I knew that I didn't have a chance of trying to reason with anybody, not even him, that I was telling the truth.

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And Baker had -- like I said before, Baker had accused me of taking this accident file home. When I left that station -- the night that happened, when I left that station, Bob Strait was there, Stacy Gelvin, Jody Lancaster and Baker. Baker called me a little while after I got home and wanted to know if I had this file. And I said, well, no. I said I didn't have it. I said I would check through my notes and things. I said, but if -- I knew I didn't. And if I did, I would -- I would call him right back or I'd bring it out. He says, no, no, that's all right. I didn't have it of course, and I called him back and I told him. And so then the next morning when I went in on the shift, Bob Strait was working that shift also. I got in

there, and I signed on that computer. I don't know where Bob Strait was. And I don't know when he -- I don't know where he was. But after a while he came out into the communications room, and he starts rumbling through -- rumbling through the press releases. And he says, well, here's that accident file. He said, you're my witness. And I tried to tell Prendergast. And I asked Prendergast, and Prendergast is accusing me of taking this accident file. I said to him -- I said -- I

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told him what happened with Bob Strait. I said, you've talked to Bob Strait? He said, no, I haven't seen him. I said, well, you ask Bob Strait about it, he's the one that found it. Prendergast left that night. He never did talk to Bob Strait. Bob Strait came on I believe at 11:00 o'clock that night. He never talked to Bob Strait. He never asked Bob Strait. I was the only one he ever asked about any kind of an accident file.

Q. So you were offended because they asked you if you accidentally took the file home?

A. No. That isn't how he asked me; accidentally. He accused me of taking it home, and he called me a liar.

Q. Okay. Other incidents that you found offensive?

A. Easton asked me one day -- he said, what do you think of your shifts. I said, I hadn't thought of it -- thought much about it. And he said to me -- he said, well, I think the 7:00 to -- well, he says, that's a nonanswer. And I said -- and I didn't say anything. He said, I would think the 7:00-to-3:00 shift would be better for your marriage. What the -- I didn't answer him. And Easton started this business

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about, well -- about what's your daughter's name? And he knew what my daughter's name was. She's the prothonotary of Fulton County. And he would say that;

what's your daughter's name, what's your daughter's name. And I'd say Patty. Well, where's she work at. He knew where she worked. I said, the courthouse. Then it would be a couple days later start this again; what's your daughter's name, what she's like, things like this. And Easton had a reputation for liking young girls.

Q. And you know this how?

A. Because the second -- either first or second day that I was there Stacy Gelvin was parading around in her -- in her short dress. And she was cold she said. Easton was there. Easton left the communications room. She was walking around hugging herself. Easton came back. He had his windbreaker. He came in, and he put it on her. She's walking around like a teenager walking around with their boyfriend's school jacket. She's walking around. Later on that day I went out of the communications room to take a message back to his office, and there he was on back the hall. He had Stacy Gelvin up against the wall. He had a hand on each shoulder, and he

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was pushed up against her. His face was only inches maybe from hers. I just put the note into the -- in his office and went back down the hall. I just really -- I just wanted to go there and do my job. What they did, you know, that was somebody else they had to answer for. Then a lot of other things that we had heard probably are considered rumors. He was involved in Camp Cadet program.

Q. Actually I'd like to just know anything you saw --

A. All right. All right.

Q. -- or you heard.

A. Had a twenty something Fulton County news reporter named Shannon Rotz. She had complete run of that station. Any time she came to the station, I was told to let her in. She would come in, and she would go directly back to his office. She spent time with him. And

if she -- if he wasn't there, she'd go back to visit Baker, if he was there, or some of the other corporals or whatever she could find. But this one day she came in. She went back -- well, she was supposed to be there to pick up the news releases. She went back to his office. She came out along with him, and she was carrying a plant his wife had

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apparently gotten him because they mentioned that. She said the plant needed more light because his office was too dark for the plant. She took the plant, put it up there on the file cabinet. And then she said about her back hurt and so -- and would he fix her back. He goes and he puts his arms around her, pulls her tight up against him. And there they are wiggling around in the communications room. I mean he -- he's rubbing up against her.

Q. Did you say anything to him or her?

A. No. There was no -- there was no reason. She had complete -- it was understood that you left her in. She had complete run of that place, and you didn't say anything to her either.

Q. Okay. Other incidents?

A. I don't know what else. I don't know what else at the moment I would think.

Q. So at the moment you just can't think of anything else? That's fine. Are you aware that the department has a sexual harassment policy?

A. Yes.

MS. YERGER: I want to mark this Suders 4. (Document entitled Sexual Harassment Policy produced and marked as Suders Exhibit No. 4.)

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BY MS. YERGER:

Q. Have you seen this policy before?

A. Yes.

Q. Okay. Did you have to sign for this policy?

A. I don't remember signing for it because I think -- I don't remember signing for it, but I think I probably received this when I went to school.

Q. Okay.

A. And then I had hunted it up out of the AR manual probably.

* * * * *

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Q. Nancy, did you ever experience any unwelcomed sexual advances?

A. I don't know -- I don't know if I can actually -- I don't know if I can actually determinate what unwelcome sexual advances are because when Easton's talking about sex with animals, maybe that's what that was.

* * * * *

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BY MS. YERGER

Q. I believe the last question was, did anybody ask you for sex; to have sex with them?

A. No.

Q. Did anybody physically touch you?

A. No.

Q. Did anybody make any kind of contact with you that you considered sexual?

A. I considered it sexual when Baker was standing there grabbing himself.

Q. Okay. Did anybody tell you jokes that you were offended by?

A. They -- they weren't exactly jokes. Baker

made racial remarks, but they weren't exactly jokes.

Q. What kind of racial remarks?

A. I have a lot of -- I have a lot of friends who are black, and that makes no difference to me. But I had taken a call, and it was from our black community west of town. And I put out over the radio that there's an incident out there at the black community that need a response. And it wasn't much of a response, but they went. They came -- when the officers came back -- and Baker was there too. I don't know where he was when I put the call out. They came in there, such carrying -- he started carrying on. He said, you better stop making racial remarks. I said, I don't make racial remarks. He said, you're going to have all those niggers surrounding this building, he said, with guns. I said, I don't -- I don't do stuff like that. I said, they're not going to be offended. I said, it's the black community. I said, I have friends out there. I said, I -- you know, if anybody comes out and says anything, I'll talk to them. I said, I did not make a racial remark. And he kept this up. Then Trooper Loopy

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came in. He was laughing about it; you better stop saying that out over the air. And I said, I did nothing wrong.

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BY MS. YERGER

Q. Okay. You have already explained that you did not report any of these incidents which you've told us about and that you then went to Virginia Smith Elliott, is that correct?

A. Yes.

Q. That was in line with the affirmative action -- or with the sexual harassment policy? Did you do that because you read the sexual harassment policy and then realized? Like, how did you know to talk to Virginia Smith Elliott?

A. When I was in school in June, Virginia Smith

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Elliott taught a class. It had to do with sexual harassment, and she did it for a good talk. I knew I needed help. After the class was over I went to her, and I asked her if -- I told her that she -- that I was interested in her class and everything and it was a very good class. And I said -- I told her that -- I said, I might need some help. And I said, do you have a card? And she said, no, I don't have a card. She said, but I'll write my name and phone number down for you; if ever need help, you call me. She took my paper, and she wrote her name and her phone number. And I'm not -- I haven't looked at it recently. I don't know what else just on it. So when things got so bad, I thought that I could go to Major Virginia Smith Elliott.

Q. Okay.

A. And that's why I called her. I never saw her name out on any station posted or any -- in any manual. I talked to her directly in June, and that's how I knew who to call.

Q. Okay. So -- and you called her in August?

A. Yes.

Q. Could you tell me about the context of the telephone call with Virginia Smith?

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A. Things had gotten so bad. I was so afraid of what might happen to me. By that time I -- I was -- I had -- I kept my pocketbook and my notes right with me at all times right there at that communications desk. I was only

taking a bottle of water and some pretzels. I mean it had gotten -- the harassment had gotten so bad. And so then I was off the 18th and the 19th of August. I called her up on the 18th, and I told her. I said, I need help. I said -- I told her what was going on. And I said, I am afraid. I said, I want an investigation started now. I said, I'm afraid they're going to set me up with drugs or something. I said, I don't know what they're going to do to me. I was keeping my vehicle locked. It just got -- it just got to be unbearable. I told her all -- I told her about he had -- Easton had called a friend of mine. It was Republican Chairman Mikeal Fix. He called Mike for a meeting, and he discussed me with Mike. But when I told her that he had called a friend of mine, first words out of her mouth was, is it a boyfriend? We're talking -- I'm talking to a major of the Pennsylvania State Police, and she thinks she's taking a call from just -- I don't know who. And she asked me if it's my boyfriend? And

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I'm telling her how much pain I'm in, how I'm afraid of these people. And she thinks I'm talking about a boyfriend. And I told her -- I said, no, it's -- I said, it's a Republican County Chairman. I said, he called him up. And I told her about -- I told her about what was happening to me. And I asked her for her help. And she tells me to get the form at the station. I said, there's no one here that I can get the form from, I don't know if I can find it. I said --

Q. Did she tell you where the form was?

A. She said -- she -- I think she said it was in the AR manual maybe, but I didn't know how to find it. And I told her that I -- I said, I don't have any help here, I can't ask anybody, I don't know if I can find it. I said, if I can't find it, will you send it to me? She said, well, just a minute. She left the phone. A minute or so elapsed. She came back. She said, well -- she said, you try to get that form. I said, if I can't find it then, I said, will you send it.

She said, I'll see what I can do. That was her response. She never said she would give it to me, send it to me or anything. I was supposed to hunt for this form in some manual.

Q. Did you tell us earlier that you were aware

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of the administrative manual; the administrative --

A. I knew they had manuals there. And I was being watched constantly by Prendergast. I had to be very careful what I did. I would get in those AR manuals every chance I got and try to go over them to find what I could do to stop this. And I never did find the form.

Q. Okay. You did receive one at some point, though?

A. No.

Q. Did you fill out a form?

A. What I found -- found at the state police was a -- was some kind of a -- it was similar to what I thought maybe would work, and I was wrong. And I put my information in it. And that's -- and I made copies of that, and that's what I eventually handed over to the Senator and all of his people. But I didn't even know then I didn't have the right form. But I was never sent a form by the state police. She didn't even ask my address. She wasn't interested in sending me any form. I was supposed to hunt for this form in this -- I don't know what -- jungle of people that -- I couldn't get the form. I couldn't find it.

Q. Did she tell you that she would not send you

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a form?

A. She kept telling -- she kept telling me to hunt for it. I asked her, and she -- if she would send me the form if I couldn't find it. And she said, I'll see what I can do. She never said, yes, I'll send you the form, what's your address. Never once did she ask me any of that. And I'm still trusting somebody at that point. I'm still thinking

somebody's going to do the right thing here.

Q. Okay. It's my understanding that -- or tell me if I'm wrong. How did you end your employment with the Pennsylvania State Police?

A. Do you want the whole story of the last night or what?

Q Yeah. I want to know about the last night you were working there. What happened?

A. I had the 3:00-to-11:00 shift. And I went into work. And Baker was working. Sechoka was there. I'm not even sure if he was supposed to be working now. I saw Zimmerman. These are corporals. I saw Zimmerman in a pair of shorts and a T-shirt that night which I thought, I wonder why -- if he wasn't working, why he was even there. And then Prendergast was there. And Trooper Dixon was there.

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Trooper Hemming was working too that night. But at 7:00 o'clock -- any time I left the communications desk, I had to put it on overhead. That meant everybody knew that I was not at the communications desk. And I went back to the bathroom, and I went to the bathroom. I flushed the commode, and I looked at it and -- I looked at the commode, saw all these -- this blue spots and stuff. And I thought -- and I thought -- well, I knew it didn't look like TidyBowl or something. But it was these blue spots, and I thought, I wonder what that is. And I thought, I'm going to look in that dresser to see whether -- what else they got in there of mine, what else are they doing to me. At that point I was -- I was just getting so tired of all the harassment and the hatefulness. I pulled the drawer open, and there was two envelopes there. The small one, looked in it. And larger one -- well, I looked in the smaller one. It was more of my stuff. Put it back in, looked in the other one. It was just more of incidents I had made up.

Q. What stuff?

A. Incidents. Incidents that I had made up on I believe it was August the 12th.

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Q. I'm sorry.

A. I had made incidents. If you get a call, you have to make an incident up on the computer, and then it has to be filed. Someone had went and made a copy of my incident. At that point I was just wiped out. I thought, what kind of people are these people? It was just constant. I couldn't go to work without them doing something constant. I had put the stuff back in the small envelope. And as I was putting -- I thought -- I was just -- I was just purely wiped out. They just weren't going to let me alone. I went -- as I was putting -- I just started shoving the stuff back in. I heard the computer go off because of the overhead. I went -- I shoved the stuff back in, throwed it in the drawer I guess disillusioned. Ran down the hall. Trooper Dixon was at the communications desk. He said, oh, Nancy, he said, it's nothing. Because I already had ran down the hall because you had to get there. I smelled Trooper Dixon's French fries. He must have -- he came out. He brought his food back in apparently. Ran in the communications room. Trooper

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Dixon said, oh, Nancy, he said, it's nothing. He said, forget it and wiped it out or whatever and didn't print it off. And I said, okay. So he went back out to eat his supper I guess. And I thought, what in the world are these people doing. Why would they make a copy of my incident? There's nothing wrong with it. I thought I'll go look at the copy that's in the file cabinet. It was right there in the communications room. Pulled the drawer open, and I was hunting for the incident. And I noticed I had blue on my fingers. I knew they had put something in there. I knew they had.

Q. Put something in where?

A. On the commode and probably the handle. I knew -- in the paper towels because I had seen the blue. And I thought --

Q. Well, did you tell us that you were in the drawer where there was files of your incident reports?

A. I pulled the -- well, where I got -- no. I don't understand.

Q. Is it -- didn't you just say that you looked in the drawer with the -- with the files that had your incident report?

A. No. I didn't know anything was -- I didn't

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know what was in there. I didn't know what might be in there. I just pulled it open to see what was in there.

Q Okay.

A But then when I went back to the communications room, that's when I pulled the file cabinet open to see what -- what the file -- what the incident looked like. What in the world -- I was thinking to myself, what in the world did they do this for? And as I did I saw the blue on my fingers, and I knew that they had put something in the bathroom on the commode.

Q. After you saw the blue on your fingers, what did you do?

A. I had some cream there, and I just started wiping it off. I mean at that point I was just -- I was devastated at that point. And I got most of it off, and I just went over into the -- where they do the fingerprinting. Over there there's a sink, and it has Go-Jostuff there. I just starting getting some of it and started smearing it on my hands. And Sechoka, he comes out. He came out of the corporal's room. And I said to him -- I said, there's blue stuff back there in the bathroom. He said, you're not going to get that -- I told him it was in the bathroom, it

was on the commode, it was on the handle, the paper towels. He said, you're not going to get that off. He said, that's on that dresser. Well, I knew it was on the commode because I saw it on the commode. And he said, I'm going to call the sergeant. I just kept cleaning my hands off, went back in the communications room. Baker came -- Baker was there. He said -- he said, that's bad getting into somebody's stuff. I said, I didn't get into anybody's stuff. Walked over to the drawer in the communications room that had Jody Lancaster's name on it, pulled it open, said, what did you get into here. I said, I didn't get into anything in there. He yelled back to Sechoka. He said, John, where's it at in here. Sechoka said, it's back -- it's not in there, it's back here. So then I told Baker -- I said, well, I'm resigning. I couldn't -- you know, I think at that point I said -- and he said -- I said, I'm resigning. I had a resignation there that I had in my pocketbook. And he said, well, you can't leave. And I said, well, I'm going to leave. I said, I'm resigning, I'm leaving. I couldn't stand -- take it anymore. And he said to me -- he said, well, you're

not leaving. He said, you're a suspect. I said, a suspect? A suspect in --

MR. BAILEY: Just one second. Why don't we suspend and go off tape.

VIDEO SPECIALIST: It's approximately 1:47. We'll be off tape for lunch.

(Luncheon recess.)

VIDEO SPECIALIST: It is now 2:53 approximately. We're back on video.

BY MS. YERGER:

Q. Okay. Before we left off to take a lunch break we were talking about your last night on the job. What I think I want to do, I have a couple documents I want to get through. I think it might be -- including the complaint itself. I think it might be easier to do -- go through the documents. And then if I have additional questions, go back and ask those. I don't want to be repetitive. If I am, I apologize. And I don't want you to repeat things that are upsetting or bothersome to you. We'll just make sure that we've covered all the bases. And you were telling us about your last night, and I'd like to have a document marked.

(Discussion held off the record.)

(Letter dated 8/19/98 from Nancy D. Suders to To Whom It May Concern produced and marked as Suders Exhibit No. 5.)

BY MS. YERGER:

Q. Nancy, could you identify that document for me?

A. It's my resignation.

Q. And is this a document that you gave your last night at the barracks?

A. Yes.

Q. Okay. And what night was your last night?

A. August the 20th, 1998.

Q. The date on this is different than that. Can you tell me why?

A. I had talked to Virginia Smith Elliott on August the 18th. I was off the 19th. I had told her that I was afraid. I had told her I didn't know what they might do to me. And I knew that it might get so bad that I would have to resign and -- because of the harassment. And so I -- on -- I was off August 19th. I just typed it up and was keeping it with me. And then I went in there August the 20th, and that's when all these things happened.

Q. Okay. Who did you give the letter to?

A. I tried to give it to Baker. Baker wouldn't

him -- I said, I want -- I said, I'm resigning and I am leaving. He wouldn't take the resignation. And I guess I was going to do what was right by resigning -- you know, resign I guess instead of just walking out, and he wouldn't take it.

Q. Okay.

A. He told me I couldn't leave.

Q. Okay. And why don't you tell us why. Tell us why he wouldn't let you leave or what the incident was.

A. When I went back into the -- after I was -- washed as much of the blue off my hands as I could get off, went back into the communications room. Baker was there. And -- well, I told you before about he asked what I got into and all that stuff. And I said to him -- I said about I was resigning, and I said, and I was leaving. He says, you can't leave. And I said, well, I'm going to leave. I said, I'm resigning, I'm leaving. And he said, you can't leave. And I asked him, why can't I leave. He says, you're in -- you're a suspect in a theft. I said, a theft? I said, what was taken -- what was taken, you know, what is that? And he said, well, Jody Lancaster had something taken, something to that

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effect. And he said -- I said, what was taken? Well, he didn't know. I said, well -- I said, I'm resigning. And he said -- before that he kept saying to me, trust me, trust me, tell me what's going on, pretending like he didn't know what was going on. And then he turned around, and he told me I was a suspect in a theft. So he definitely knew what was going on. And he just -- he wouldn't let me leave. He said, the sergeant wants to talk to you. And Sechoka had went to call the sergeant. And he -- you know, Baker kept telling me I couldn't leave.

Q. Okay. So --

A. And so then he said -- I said, well -- I said, I'm going to leave. He says, no, you're not. He said, if you leave, you're going to be AWOL. I said, AWOL? I said,

that's in the military. I said, you going to put me in jail? I know in the military if you go AWOL, then you go to jail. Are you going to put me in jail? He said -- well, he said, no, but you're not going to leave, you're going to -- the sergeant wants to talk to you. And that's really what kept going on until the sergeant showed up.

Q. And then what happened?

A. The sergeant showed up. And Easton and Sechoka I think -- I'm not positive, but I think they were

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back in the women's locker room. I don't -- I think that's what -- I don't know what they were doing. And they didn't come out, and they fooled around. And it was just about 8:00 o'clock I think. I'm not sure -- positive of the time. I told Baker -- I said, it's like this. I said, I'm not going to spend the night here, I am resigning and I want to leave, I'm leaving. He says, you're not leaving. I said, are you going to grab a hold of me?

Q. I think we understand that. What happened when Sergeant Easton --

MR. BAILEY: No. This is a different -- go ahead.

THE WITNESS: Right.

MS. YERGER: This is a different incident?

MR. BAILEY: This is not the same. Yeah. This is not the same.

MS. YERGER: Okay.

MR. BAILEY: I know what you're saying. It's confusing. She's talking about before. It's not the same.

MS. YERGER: Okay.

THE WITNESS: Right. Easton had arrived.

MS. YERGER: Okay.

MR. BAILEY: Yeah.

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THE WITNESS: So I -- like I said, it was around -- almost 8:00 o'clock I believe. I told Baker -- I said, I'm not

spending the night here, I'm leaving, I'm resigning, I said, and I am leaving. He says, you're not leaving. I said, have you been assigned to keep me here? He said, the sergeant said you're not leaving. He said -- I said, are you going to grab a hold of me? He said, well, you're not leaving. He said -- he said I wasn't leaving. So he went -- what? Do you have a question?

BY MS. YERGER:

Q. No, no. Please continue.

A. So he said -- you wait here, he said. So he went back the hall and came back, said, the sergeant said that he'll be out in about five minutes. So then something like I guess -- I don't know how long. Easton, Sechoka came out. Easton told me to sign off the computer. I signed off the computer. And they told me they were taking me back to the interrogation room. They hauled me back to the interrogation room. Easton and Sechoka's there with this paper, and they tell me to sit down. And the only people I had ever seen back in that interrogation room was prisoners that I

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picked up. But there they had me back in this interrogation room. And Easton said, well, I'm going to read you your Miranda rights. He said, I don't know if it's necessary or not, but I'm going to read them to you. I said, am I being charged with something? No. Then he proceeded to read me Miranda rights. So then he said -- then he asked me if I understood. I said, yeah, I understood my Mirandas. And I'm thinking, why are these people -- what are they doing to me? And so then he said that he had a letter taken out of my personnel file or something, did I take it. I said, no. He said, Jody Lancaster had a letter taken out of her file or something, did I take that? And I said, no. And he said -- he said -- he said that -- he said, do you have it at home. And I said, no. And I said, I want my attorney. So he said something that I didn't catch, signed -- him and Sechoka

signed something I guess. I don't know what they did on the back of the Miranda. And I said, I am resigning. He ignored me. He went out of there, and he went past me. And I said, I'm resigning, you know, I'm leaving. He turned around, and it was -- there's a desk

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there or table. And he said, Corporal Sechoka wants pictures of your hands. And I was so upset and I was so scared of what they might do because Sechoka had a reputation of beating up people too. And I don't remember what I said, but he yelled at me. He said, I said to put your hands down. I was holding my resignation and my ink pen. And I hesitated or something, and he yelled again, I said to put you hands out on that -- on the table I think is what it was. Anyway, I put my ink pen, my paper down. I put my hands out, and Sechoka took pictures of the front and back of my hands. There was no way for me to get out of that room. Sechoka was in the front of me. Easton was off to the right -- my right shoulder right up against me. If I turned around, I would have ran right smack into him. I knew better. And then he'd probably charge me with assault. But I knew not -- I knew I had -- I'd better do it. And there was somebody in the doorway. I got a glimpse when I finally did get to turn around, but I don't know who that was.

Q Were your hands still blue?

A. There were very little blue on them. I've

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never seen the pictures. I don't know how much was on them. But I had already asked for my attorney. And so I picked them -- Easton turned away then after Sechoka took these pictures. I said, I'm resigning. He ignored me. I said, I'm resigning. And he turned around, and I -- I signed -- I must have just put August the 20th. I was thinking I put the -- I don't know. I thought I had a date

on -- a time, but I apparently didn't. But I put the date in, and I remember I was shaking there. I slapped that date. I just wanted out of that place. And signed it, and he did take it.

* * * * *

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BY MS. YERGER:

Q. Can you identify Suders 8 for me, please?

A. It's an employee performance review.

Q. Did you sign it? It would be the second-to-the-last-page at the bottom.

A. I signed it that I disagreed with it.

Q. Okay. And what date was this?

A. The eighth month, fourth day, '98. August 4th.

Q. And is there anything specific -- the last page is an attachment of additional comments. If you want to take a second to review that, if there's anything specific that you disagreed with?

A. Well, I disagreed with a lot of it.

Q. Okay.

A. Do you want more of a response than that?

Q. No. That's all right actually. Not to bounce you around, but I want to go back to the complaint now.

MR. BAILEY: PHRC or federal?

MS. YERGER: Federal.

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THE WITNESS: I have another copy.

MR. BAILEY: Why don't you give me my copy back. Thank you, Nancy.

THE WITNESS: What page?

BY MS. YERGER:

Q. It would be page 3-F.

A. (Reading.) Yes.

Q. Did Corporal Baker say what trooper?

A. Yes.

Q. And what trooper is that?

A. Trooper Carl Dixon.

Q. Where did he make the comment?

A. In the communications room.

Q. Did he say it to you or was it --

A. Yes.

Q. Was there anyone else in the comm room?

A. No.

Q. Did you tell him you were offended by his comment?

A. Yes. I told him that was a terrible thing to say. I said, you shouldn't say things like that about that lady and Trooper Dixon. I said, that's a terrible thing. He just laughed.

Q. Did you --

A. He said, it's true. He thought it was

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funny. He just laughed about it. That's a hateful thing to say about anybody.

Q. Did you tell any of the other corporals about that comment?

A. No. It was no use.

Q. How about the sergeant?

A. No. There was no use to.

Q. How about anybody else in the Pennsylvania State Police?

A. No.

Q. Okay. G and H, I think you already described this; that Corporal Baker and PCO Strait were giving each other a back rub?

A. Baker was rubbing Strait.

Q. Okay. Again -- and if I asked you this already, I apologize -- did you tell them you were offended by it?

A. Yes.

Q. And what did you say?

A. I told them they should -- that they shouldn't do

stuff like that. And Baker, he said to me -- he said, what's the matter, don't you like gays? And I didn't answer anything. There was no yes or no to that answer. Like I said before, hey, if they liked each

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other, that was their personal business. I didn't care what they did in private, but they shouldn't have been doing stuff like that in front of me.

* * * * *

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BY MS. YERGER:

Q. Again, did you report to any of the other corporals or anyone else at the barracks this conversation between Corporal Prendergast and Sergeant Easton?

A. No. I -- you know, you keep asking me that. There was -- there was nobody to go to at that barracks. And that was such a horrible, horrible thing for anyone to say. Who -- how many people could I have repeated this to anyway?

Q. In your PHRC complaint you said that it was on July 13, 1998, that you made the statement -- or that they made the statement about the blow job. If the statement was so horrible, why didn't you go to Major Smith Elliott with it then?

MR. BAILEY: I object. I'm going to let you respond to that, okay? I object to that question very strongly and very emphatically. I'm going to let you respond to it. Go ahead.

THE WITNESS: I was complaining --

MR. BAILEY: Let me do this just very briefly. I'm going to give you some instructions. Do not assume, when you are asked a question by opposing counsel

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or any attorney, even if it were me, that that question is based on the status or state of the law or that any implication that you have a duty to do something that might be contained in that question has any meaning whatsoever.

Do you understand me?

THE WITNESS: Yes. I believe so.

MR. BAILEY: Those are my instructions. A number of these questions have been asked and answered. But we're going to go ahead and go through this and exhaust this. I'm going to bend over backwards, okay? So if you can restate the question or rephrase it or perhaps you can read it back. You go ahead and respond. Do you remember the question?

THE WITNESS: Yes. She asked me why I didn't complain to Virginia Smith Elliott then.

MR. BAILEY: On July 18th when the statement -- you go ahead and respond. Go ahead.

THE WITNESS: I had been complaining to everyone; everyone who I thought would help me. I talked -- I was talking to Senator Jubelirer's office -- well, Mike -- through Mike. Just like the evaluations you showed me, those evaluations were sent to the Senator's office because they -- it was nothing but lies. I complained to

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the Senator -- like I said, the Senator's office knew this was going on.

I complained to the union. I complained -- I thought somebody out there someplace would help me. No -- everybody just said, just hang in there, we're going to do everything we can.

* * * * *

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(Supervisor's Notation dated 7/22/98 produced and marked as Suders Exhibit No. 9.)

BY MS. YERGER:

Q. Could you identify that for me, please?

A. It's a supervisor's notation.

Q. And had you seen it before?

A. Yes. I refused to sign it.

Q. Okay. And it says that Corporal Prendergast -- you were asked by Corporal Prendergast if you knew how to update the PFA registry file form. And you indicated you still did not understand the procedure required, even though the assignment was given to you on May 12, 1998. Do you remember that being said?

A. Yes. I remember this paper.

Q. Was it true -- when was -- what was the date on this?

A. July 22nd.

Q. And the assignment was given to you on May 12th?

A. Yes.

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Q. And the purpose of the supervisory notation is because you still hadn't gotten the assignment done, is that correct?

A. I still hadn't been trained.

Q. Okay. Had you asked anybody to train you other than Jody Lancaster?

A. I asked Prendergast for help.

Q. Okay. Did you ever do this PFA?

A. Yes. Eventually I learned how to do it.

Q. Did somebody help you?

A. I would -- I asked probably -- I'm not -- I'm just speculating. I learned how to do it eventually on my own. I was familiar with the -- with a PFA from working in the sheriff's department. I understand PFAs.

Q. All right.

A. As to what information you need.

Q. But you didn't do it before July 22nd -- you didn't learn how to do it before July 22nd?

A. No, because I hadn't -- I hadn't -- I hadn't been trained on it.

Q. Okay.

MR. BAILEY: Where is Suders 6, if somebody could help me?

MS. YERGER: It's the PHRC complaint. You should have that.

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MR. BAILEY: You already marked it? Okay. Thank you. Do you have yours? I'm sorry. I'm reading from it. Oh, my, what am I going to do.

BY MS. YERGER:

Q. Okay, Nancy. I want to show you what I want marked as Suders 10. I'm sorry. I keep doing that. (Desk Memorandum dated 7/26/98 produced and marked as Suders Exhibit No. 10.)

BY MS. YERGER:

Q. This is a -- or actually tell me what it is.

A. It's a desk memorandum from Corporal Prendergast.

Q. Can you tell me what it relates?

A. I'll have to read it here. Okay. Now do you have a question?

Q. Yes. My question is: Do you recall the incident with a CLEAN message about -- from the Ohio authorities coming into the barracks?

A. Yes.

Q. And what happened with that?

A. I showed it to whoever else was there. And they said, don't worry about it, they said, because -- they escaped from Ohio, and there was no indication that

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they would be coming to Fulton County. And they just told me to put it in the bin.

Q. Who is they?

A. Whoever was there. I don't remember who it was. I tried to tell Corporal Prendergast this, and he didn't pay any attention of course.

Q. Who would have been somebody you would have listened to?

A. I talked to whoever was there; another trooper or -- everybody was telling me what to do; troopers, supervisors. They were all telling me what to do. And if there wasn't a supervisor, then, you know -- I ran all those messages past troopers, supervisor, corporals, you know.

Q. So you were told-- your testimony is that you were told to --

A. Just put -- I did whatever I was told to do. It was placed in the crime corporal's bin at the front desk. And corporals are around all the time, and they're supposed to be getting their stuff out of their boxes.

Q. Okay. I'm looking at Suders 8. I'm on the back page. Under communications it says, needs improvement, you do not handle criticism well. Did Sergeant Easton, Corporal Prendergast or

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Corporal Baker ever say that to you?

A. No.

Q. But it was your testimony that Corporal -- I don't mean to trick you. But wasn't it your testimony that Sergeant Easton read this to you?

A. He read it to me, but you said -- you repeat that other question though. You said did they ever tell me that.

Q. Okay.

A. He read it in here. That's -- so much of this wasn't true. You know, it wasn't true, and that's why I

refused to sign it.

Q. Okay.

A. They put anything they wanted into this. It didn't mean it was true.

Q. So you're denying that you didn't have a problem handling criticism?

A. I never said anything back to them. I went in there, and I never said a word back to those people. I didn't. I just left them keep pounding on me.

Q. Okay. I'm looking at your federal complaint again, Paragraph 11, when you contacted Major Smith Elliott.

A. Yes.

Q. Do you remember when in August?

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A. August 18th.

Q. Is when you called her?

A. Yes.

* * * * *

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BY MS. YERGER:

Q. Showing you what's been marked as Suders 11, could you identify that for me, please?

A. Well, it's a -- it's a letter from I assume Grant Gordon to Easton stating that -- the information about the CLEAN test.

Q. Okay. And then at the bottom of it?

A. And there's a note from Easton.

Q. To you?

A. Yes.

Q. Did you receive that note?

A. Uh-huh.

Q. Okay. And what does it say?

A. Do you want me to read it to you?

Q. Sure.

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A. Nancy, as per the above information, please complete this exam and return to me by 8/15/98. This is a job requirement. If you need any assistance on how to locate the information needed to complete the exam or if you need anyone to assist you with your PCO duties while you complete the exam, please see me or the supervisor that is working the shift with you.

Q. Okay. Did you complete the exam?

A. Yes.

Q. Did you fail the exam first?

A. I don't know. I don't know. I never saw -- I never saw the test. I never saw it. I never saw the results.

Q. How many times did you take the test?

A. Approximately three different times.

Q. Okay. All right. I want you to describe to me the ladies' room. You mention it in Paragraph 17 at the substation at work. You also mention it in 18. What was in the ladies' room?

A. Okay. There is a commode, a sink, a shower, a bed, a chest of drawers, a closet type -- I believe it probably was a removable type closet, another dresser. Then you'd be back at the door.

Q. Okay.

A. That was the circle of the room.

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Q And were you told by Jody Lancaster that -- or anyone that the drawers in the dresser -- any of the drawers belonged to anyone other than you? Were the drawers marked?

A. No.

Q. When you were shown around on your first day, did any -- did Jody or anyone else point those drawers out and say, these are your drawers and these are PCO

Gelvin's and PCO Suders'?

A. No.

Q. Where did you put your personal belongings?

A. In my drawer in the communications room that had my name on it. And in the patrol room I had a drawer back there with my name on. And I put things in both places. Mainly I put it in the communications room in that drawer because that's where I could watch my stuff.

Q. Okay. In Paragraph 20 -- actually in 19 you say that on the night in question you noticed a drawer partly ajar to one dresser and looked in. When you say night in question, do you mean the night that you resigned?

A. No. I -- no.

Q. Okay.

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A. No. That's not the night. That's not the first night I looked in, no.

Q. So in Paragraph 20 you say out of simple curiosity you opened the drawer and found it had certain contents in it?

A. Uh-huh. Right.

Q. When you opened the drawer, you didn't know it was Jody Lancaster's drawer?

A. No.

Q. Okay.

A. No, I didn't. And I still don't know who all that stuff belonged to.

Q. Why did you open the drawer?

A. Why not? I had complete run of the station, and I just -- I didn't know. Maybe I'd need like toilet tissue or paper towels or something and --

Q. Did you need them that night? Is that --

A. I don't really remember what I needed that night, but I looked in the drawers. There was no reason not to.

Q. Okay. And you say that there were -- there was some personal information about you. What was the -- what was the personal information?

A. Well, in the drawer -- the one drawer, it was -- there was my CLEAN test; the test that Easton was

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-- and Jody Lancaster -- both of them were supposed to have sent to Hollidaysburg.

Q. Were there other tests there?

A. Just mine.

MR. BAILEY: Is that the test she questioned you about previously; the CLEAN test?

THE WITNESS: Yes.

MR. BAILEY: Okay.

THE WITNESS: Yeah, it would be that one.

MR. BAILEY: Okay.

BY MS. YERGER:

Q. Okay. You say that there were a group of papers. What were the other papers?

A. Other incidents that I had made up and messages that I had given to other troop -- to some of the troopers.

Q. And were they in a folder?

A. Not at that point.

Q. They were just laying in the drawer?

A. They were in there, yeah.

Q. Which dresser was it?

A. It was the one as you walk in the door.

Q. Where was the other one?

A. Over there by the bed. It's very -- the room isn't that big.

* * * * *

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Q. Were the answers to the test in the drawer too?

A. I don't remember an answer sheet. I don't remember an answer sheet. I knew -- I knew -- I don't remember an answer sheet.

Q. Okay.

A. But --

Q. You told us that it was the test and then some other things?

A. That I had made up.

Q. That you had made up?

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A. Uh-huh.

Q. How many approximately? Do you remember?

A. I don't know how many pages there was to the test, so it's hard to say. I don't know. Maybe -- my test plus maybe four other papers maybe.

Q. Okay.

A. I don't know how many pages that was.

Q. In Paragraph 23 --

A. Uh-huh.

Q. -- you say that you took the papers out of the drawer?

A. Uh-huh. That night Jody Lancaster came to work at 11:00 o'clock; the same day I talked to Easton. She -- and I said to her that I had been given this letter and that I had to take that CLEAN test again. She said she didn't know anything about it. And I said, well, they said I only made a 78 on it and I'd like to know which questions that I missed. She said, well, she didn't -- she said, didn't they send it back? I said, no. I said, I'd like to know. Well, she didn't know anything about this test, didn't know anything at all. I said, well, I'm going to call Grant Gordon and I'm going to -- I'm just going to ask Grant to just send that test to me back here so that I can look at it and review it.

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And -- well, she didn't know anything about any test, and she was really surprised that they didn't send it back. So I went home. And I thought -- I thought that test is going to be gone now. So the next day when I came into work

and I went back to the bathroom that evening, the test and the paperwork had been put in an envelope; manila envelope. I pulled it out, I looked at it; same -- my stuff. So I went and I got some typing paper -- white paper -- and another envelope. And I put those papers in that envelope, put it in that drawer and took the -- all my -- my papers and took it out to the desk and --

Q. Where are those papers?

A. Well, I have them.

Q. Okay.

MR. BAILEY: Did we produce those with the document request?

MS. YERGER: No. No, you didn't.

MR. BAILEY: That might be my fault, Nancy. I'll go back through the file and see.

THE WITNESS: Because I'd given you --

MR. BAILEY: I think -- I think -- I thought I had Adrianne copy the documents for them. We'll produce them. That's okay.

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MS. YERGER: Okay.

BY MS. YERGER:

Q. Okay. So you took the papers out of this drawer?

A. Uh-huh.

Q You don't know whose drawer it is, and you don't know whose papers --

A. Well, I knew whose papers they were. They were mine.

Q. The test was --

A. That was my test.

Q. Once you turn the test in, whose responsibility is it?

MR. BAILEY: That's not an issue in this case.

MS. YERGER: Okay. Okay. No, you're right. I'll withdraw that.

MR. BAILEY: You know, that's --

MS. YERGER: I'll withdraw that.

MR. BAILEY: Okay.

BY MS. YERGER:

Q. You believe that because you took the test, it was yours and you could take it, am I correct?

A. Well, it's like --

MR. BAILEY: Object to the form of the

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question. She went back -- when she says my test results, she's not talking about rights, titles and interests as a court of equity may somehow decide. She's talking about this is a test that I took, they're my test results. And I do think that there's a proprietary interest in any test that I take. Regardless of who it's turned into, I have an interest in it. It's my work product. I don't know what the question's supposed to mean.

MS. YERGER: I'll move on.

MR. BAILEY: Thank you.

BY MS. YERGER:

Q. You went to check the drawer again?

A. Uh-huh.

Q. That's what you say in Paragraph 24. And you say to see how Easton and Lancaster responded. What do you mean by that?

A. See what had happened after they found out that they no longer had the test that they were supposed to send to Hollidaysburg.

Q. Well, if you didn't know it was PCO Lancaster's drawer, why would she know the test was missing?

A. Well, I didn't really know -- well, okay. Easton and Lancaster had both told me that that test was

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sent to Hollidaysburg. So when I -- so they must have been the ones back there putting the test in the drawer.

Q. Was the test an original? Since I don't have it, it's kind of hard. Was it an original or a copy? A. No. It was

original. It was my test.

Q. And the other documents, were they originals or copies?

A. They were copies. They were copies of things that I had done.

* * * * *

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MR. BAILEY: Nancy, let me help with this because she's raising a good question. Paragraph 19 -- I realized I composed the complaint. Paragraph 19 says on the night in question plaintiff noticed a drawer partly ajar and went to the dresser drawer and looked in. In describing events you appear to have described at least two occasions when you went into that drawer. I think she's looking for you to clear that up.

BY MS. YERGER:

Q Was it the same evening?

A. As I resigned?

Q. Yes.

A. Not with the first time I went in the drawer.

Q. How about the second time you went into the drawer? Was that the same evening or was that the next evening?

MR. BAILEY: Nancy, it's okay. Try to think. How many times did you go in the drawer on the day that you resigned, the shift that you resigned?

THE WITNESS: Just once.

MS. YERGER: Okay.

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MR. BAILEY: Prior to the shift when you resigned how many times had you looked in that drawer?

THE WITNESS: Twice.

* * * * *

[Reporter's certification omitted in printing]

PENNSYLVANIA STATE POLICE
DEPARTMENT DIRECTIVE

SUBJECT: SEXUAL HARASSMENT POLICY

26.01 PURPOSE

The Department is dedicated to providing a professional work environment which is free from all forms of discrimination, including, but not limited to, sexual harassment. Personnel shall not be subjected to sexual harassment. Founded allegations of sexual harassment shall be treated as misconduct and result in the application of appropriate disciplinary action, up to and including, termination.

26.02 GENERAL

A. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors or verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is either explicitly or implicitly a term or condition of employment.

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions, e.g., performance evaluations, selection for specialized position vacancies, Employee Position Classification Review.

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

B. There are three basic types of sexual harassment:

1. Quid Pro Quo: The offer or inference of a benefit for

submission to sexual advances, e.g., an offer of an excellent performance evaluation, an offer of continued employment or career advancement in return for sexual favors.

2. Hostile Work Environment: Conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, e.g., repeated or constant conversational references of a sexual nature, or the display in the workplace of visual materials of a sexual nature.

3. Sexual Discrimination: Conduct that discriminates against a person based upon their gender.

C. Acts of sexual harassment are in violation of Title VII of the Civil Rights Act of 1964; the Pennsylvania Human Relations Act of October 27, 1955; and Executive Order 1992-1. Specific acts of sexual harassment may include, but are not limited to:

1. Repeatedly asking a person for a date.

2. Inappropriate physical contact or touching such as patting, pinching, hugging or purposely rubbing up against another's body.

3. Making suggestive or provocative gestures, e.g., leering, staring, inappropriate gestures, comments, jokes, or stories of a sexual nature.

4. Creating or displaying sexual visuals.

5. Retaliation against any person for reporting instances of alleged sexual harassment.

D. Allegations of sexual harassment or retaliation against any person alleging an act of sexual harassment, shall be

investigated promptly, impartially and thoroughly.

26.03 REPORTING PROCEDURES

A. Any person who believes they have been sexually harassed shall contact their immediate supervisor or the Affirmative Action office.

B. When a complaint of sexual harassment is made directly to a supervisor, the supervisor shall contact the Affirmative Action Office before taking any action, unless the matter requires immediate attention.

C. When the allegation of sexual harassment is made against a person's immediate supervisor, or anyone else in that person's chain of command, the complainant shall contact the immediate supervisor of the alleged sexual harasser or the Affirmative Action Office.

D. If a full investigation of the complaint is requested or required, the complainant shall complete a Use of Force or Complaint Reception and Processing Worksheet, Form SP 1-101, which shall be forwarded directly under confidential cover, to the Bureau of Professional Responsibility. However, in those incidents where a complainant informs their Commander, Director, or Supervisor of an act of reprisal for a previous complaint of sexual harassment, or when the Commander, Director, or Supervisor is made aware of such an act through observation, the Commander, Director, or Supervisor shall complete the Use of Force or Complaint Reception and Processing Worksheet and forward it to the Bureau of Professional Responsibility. The Commander, Director, or Supervisor shall inform the complainant of such action.

E. The Commander, Director, or Supervisor who receives the complaint shall advise the complainant to contact the Affirmative Action Office for information regarding their

right to file a complaint with the State Civil Service Commission, Equal Employment Opportunity Commission, or the Pennsylvania Human Relations Commission.

F. If, after consultation between a representative of the Affirmative Action Office, the complainant and the receiving Commander, Director, or Supervisor, the complaint of sexual harassment is determined appropriate to handle informally, then the receiving Commander, Director, or Supervisor shall document all of their actions on Form STD-501, or the computer-generated Form PSP-501X, and forward same, through channels, to the Affirmative Action Office. For informally-handled complaints, disclosure of the contents of the correspondence shall be limited to the chain-of-command through which the correspondence is forwarded to the Affirmative Action Office.

G. Any subsequent complaints of sexual harassment against an individual, including those involving a different person, shall not be handled informally, and require that a full investigation be conducted.

26.04 COMPLAINT PROCESSING PROCEDURES

A. Informal: A complaint of sexual harassment may only be handled informally in instances when the Affirmative Action Officer approves an informal handling, based on the available facts and circumstances surrounding the complaint.

1. The counseling/informing of an alleged harasser by a Commander, Director, or Supervisor within that individual's chain of command, to cease immediately any actions that have been perceived by the complainant as sexual harassment.

2. Additionally, should the alleged harasser not be a

member or employee of the Department, e.g., vending machine company employe, employe of contracted service company or a member of the general public having contact with the complainant in the workplace, notification, both orally and in writing, shall be provided to the alleged harasser and their employer. The notification shall be prepared by the Commander, Director, or Supervisor and shall state the nature of the complaint and indicate that said behavior will not continue to be tolerated.

B. Formal: The formal handling of sexual harassment complaints shall be consistent with the provisions established by this regulation and AR 4-25. Complaints of sexual harassment shall be handled formally if:

1. The sexual harassment is in retaliation against the complainant for filing a sexual harassment complaint.

2. The act of sexual harassment involved inappropriate physical contact, or was an outrageous act that if founded would warrant disciplinary action, e.g., assault, attempted rape, etc.

3. The nature of the allegation and the available facts surrounding the complaint leads to a determination by the Affirmative Action Officer that the complaint be handled formally.

26.05 RESPONSIBILITIES

A. General:

1. Personnel shall refrain from conduct, implied or direct, which constitutes sexual harassment.

2. Personnel encountering acts of sexual harassment are encouraged to advise the alleged harasser that their actions are unwelcome and offensive; however, failure to

do so shall not prevent personnel from filing a complaint of sexual harassment.

B. Commanders, Directors and Supervisors shall:

1. Monitor the work environment to ensure that it is free of sexual harassment.

2. Ensure incidents of sexual harassment are processed in accordance with this regulation.

3. Take immediate action to avoid any adverse impact or reprisals against any person who reports an act of sexual harassment. Should an act of reprisal occur and be brought to the attention of the Commander, Director, or Supervisor, the Commander, Director, or Supervisor shall ensure that a Use of Force or Complaint Reception and Processing Worksheet is completed in accordance with AR 4-25.

4. Ensure that confidentiality of reports of sexual harassment is maintained in accordance with this regulation.

5. Contact the Affirmative Action Office for guidance in all sexual harassment matters.

6. Seek guidance from the Affirmative Action Officer prior to attempting an informal resolution of a complaint of sexual harassment.

C. The Affirmative Action Officer shall:

1. Ensure all allegations of sexual harassment are processed in accordance with this regulation.

2.. Forward all Use of Force or Complaint Reception and Processing Worksheets received regarding an allegation of sexual harassment to the Bureau of

Professional Responsibility for investigation.

3. Determine when a supervisor may handle a sexual harassment complaint informally. No supervisor shall handle any sexual harassment complaint informally without concurrence of the Affirmative Action Officer.

4. Provide the complainant with information regarding the right to file their complaint with the Equal Employment Opportunity Commission within 300 days of occurrence, Pennsylvania Human Relations Commission within 180 days of occurrence and the State Civil Service Commission within 20 days of occurrence.

5. Re-contact the complainant to provide follow-up information regarding the outcome of the investigation and disposition of the complaint. Information regarding further processing steps, e.g., issuance of a DAR to the harasser, grievance filed by the harasser, etc., will be provided if applicable.

D. The Director, Bureau of Professional Responsibility shall;

1. Ensure that any Use of Force or Complaint Reception and Processing worksheet, alleging sexual harassment, is promptly investigated.

2. Notify the Affirmative Action Officer of the Bureau of Professional Responsibility Control Number, the identities of the complainant, and the subject of the investigation.

26.06 RETENTION

Investigative reports shall be retained in accordance with AR 4-25. Correspondence regarding informally-handled complaints shall be retained by the Affirmative Action Office for the same time period, after which, the file shall be destroyed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY DREW SUDERS	:	
Plaintiff	:	
	:	**No. 1:CV-00-1655**
v.	:	
	:	**(Judge Rambo)**
ERIC D. EASTON, et al.,	:	
Defendants	:	

DECLARATION OF JODY LANCASTER

I, Jody Lancaster, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I have been employed by the Pennsylvania State Police (PSP) since February 25, 1995.

* * * * *

8. On occasion when there was bad weather, I would have to stay at work so I kept a change of clothes, including clean underwear, in my drawers in the dresser.

* * * * *

[Signature omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY DREW SUDERS	:	
Plaintiff	:	
	:	**No. 1:CV-00-1655**
v.	:	
	:	**(Judge Rambo)**
ERIC D. EASTON, et al.,	:	
Defendants	:	

DECLARATION OF STACY GELVIN

I, Stacy Gelvin, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am a police communications officer (PCO) at the McConnellsburg barracks in McConnellsburg, Pennsylvania

* * * * *

7. On my first day of work, Jody Lancaster gave me and Suders a tour of the barracks. When she showed us the women's locker room, she pointed out two dressers, and told us that one dresser had four drawers which were assigned to Lancaster for her personal use, and she assigned Suders and me two drawers each in the other dresser for our personal use.

* * * * *

[Signature omitted in printing]

Supreme Court, U.S.
FILED
JAN 20 2004
OFFICE OF THE CLERK

(8)

No. 03-95

In the Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner

v.

NANCY DREW SUDERS,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the affirmative defense recognized in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)?

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Roslyn C. Lieb, *Constructive Discharge under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern over Motives*,
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PA. STATE POLICE, *1998 Annual Report*,
available at http://psp.state.pa.us/psp/lib/psp/Annrep98.pdf
(visited December 24, 2003) 2
Practicing Law Institute, *The Employment-at-Will Doctrine: Have Its Exceptions Swallowed the Rule?*,
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Steven D. Underwood, *Comment, Constructive Discharge and the Employer's State of Mind: A Practical Standard*,
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OPINIONS BELOW

The decision of the Court of Appeals is reported at 325 F.3d 432 and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. The decision of the District Court is not reported, but is reprinted at Pet. App. 62a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 2003, and the petition for certiorari was filed within 90 days thereafter, on July 14, 2004. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

§ 2000e. Definitions.

For the purposes of this subchapter —

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees ... and any agent of such a person....

§ 2000e-2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

STATEMENT OF THE CASE

This is an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The employee claims that she was constructively discharged — that is, she was forced to quit her job — because her supervisors subjected her to an atmosphere of sexual harassment which made her working conditions intolerable. The issue is whether, under these circumstances, the employer may assert the affirmative defense recognized by *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); or whether, as the Court of Appeals held, the affirmative defense is unavailable and the employer is instead automatically liable for the actions of its supervisors.

1. The respondent, Nancy Drew Suders, was a civilian employee of the petitioner, the Pennsylvania State Police. Respondent began work in March of 1998, and was assigned to the State Police station in McConnellsburg, Pennsylvania. Pet. App. 62a-63a. The McConnellsburg station in turn was one of several which formed Troop "G," commanded by a state police captain headquartered in Hollidaysburg. J.A. 37-38.[1] Respondent was assigned

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[1] *See also* PA. STATE POLICE, *1998 Annual Report* 29, available at http://psp.state.pa.us/psp/lib/psp/Annrep98.pdf (visited December 24, 2003). McConnellsburg is located in Fulton County, a rural county on the Maryland border about midway between Philadelphia and Pittsburgh. Hollidaysburg is located in Blair County, near Altoona.

to the McConnellsburg station as one of several police communications operators. J.A. 23, 30, 39.

The station commander at McConnellsburg was Sergeant Eric Easton, assisted by three or four state police corporals. J.A. 22, 29, 38. Sergeant Easton was formally the direct supervisor of respondent and the other communications operators, but they were also supervised on a day-to-day basis by whichever of the corporals was working their shift. J.A. 35-36, 51, 66; Pet. App. 8a-9a.

Respondent claimed[2] that Sergeant Easton and two of these corporals, William Baker and Eric Prendergast, began harassing her on a daily basis shortly after she began working at McConnellsburg. Pet. App. 64. The harassment included repeated attempts to engage her in discussions of bestiality, oral sex and genital piercing; repeated re-enactments — five to ten times a shift, even after respondent asked that it stop — of a "wrestling move" in which Baker would "grab hold of his private parts and yell suck it"; intimidating acts such as hitting office furniture; and various other sexually charged

[2]The District Court resolved this case by granting the petitioner's motion for summary judgment, and we, like the courts below, therefore recite the facts in the light most favorable to respondent.

posturing, leering and remarks.[3] J.A. 23-24, 30, 70-75, 77-81; Pet. App. 64a-66a.

Petitioner had adopted a policy specifically forbidding sexual harassment, J.A. 123-129, including "conduct ... creating an intimidating, hostile or offensive work environment," J.A. 123, and identifying as acts of sexual harassment "suggestive or provocative gestures, e.g., leering, staring, inappropriate gestures, comments, jokes, or stories of a sexual nature." J.A. 124. The policy included detailed procedures for reporting sexual harassment, for processing complaints either formally or informally, and for maintaining confidentiality. J.A. 125-126. It provided that complaints of harassment by an employee's supervisor should be made either to the harasser's immediate supervisor, or to the Affirmative Action Office. J.A. 125. The policy also included prohibitions on retaliation. J.A. 124, 128.

Petitioner's policy against sexual harassment was posted on workplace bulletin boards, available in petitioner's Administrative Regulations (AR) manual, and distributed individually to all employees. J.A. 62-63; Pet.

[3]While we assume the truth of these assertions, we nevertheless note, in fairness to the accused individuals, that they vigorously dispute them. Respondent's supervisors testified that some of these incidents never happened at all, *see, e.g.*, J.A. 33-35, and that others took place in a context quite different from that suggested by respondent. Sergeant Easton, for example, testified that he referred to bestiality only in the course of explaining to respondent her duty to classify incidents to which the state police responded: he explained to her that a break-in might be classified as a burglary, a theft, or a trespass, depending on circumstances, and that there had been cases in which an intruder had broken into a barn to have sex with an animal, which would receive still another classification. J.A. 43-44.

App. 78a-79a. Respondent was aware of the policy and located it in the AR manual. J.A. 27-28, 32. In addition, as part of her training in June of 1998, respondent attended a class in sexual harassment taught by the State Police's affirmative action officer, Virginia Smith-Elliot. Respondent told Smith-Elliot that she might need some help, but did not supply any details. She obtained Smith-Elliot's telephone number, but did not contact her again until two months later. J.A. 95.

On August 18 — two days before she would resign — respondent telephoned Smith-Elliot and told her that she was being harassed. According to respondent, Smith-Elliot told her to complete a complaint form, located in the AR manual. J.A. 25, 31, 55, 96-97; *see* J.A. 125 (sexual harassment policy, reporting procedures). Respondent asked if Smith-Elliot would send her the form if she was unable to find it. Smith-Elliot said she would see what she could do, but respondent did not contact her again.[4] J.A. 96-97; Pet. App. 67a. The next day, August 19, respondent prepared a letter of resignation. J.A. 102.

The day after that, on August 20, 1998, respondent quit the State Police. Respondent had several times taken a test on her computer skills. Each time, her supervisors told her that she had failed, but she believed that they had lied to her and had not turned in her test results. She went through a drawer in the women's locker room,

[4]Smith-Elliot testified that respondent complained that she was being discriminated against because of her age and political affiliation, but did not mention any sexual harassment; and that she promised to send a complaint form to respondent. Pet. App. 11a, 67a.

found her test papers and removed them.[5] After the loss of these papers was discovered, officers dusted the drawer with theft detection powder. On August 20, respondent again went through the drawer — to return her test papers, she said — and the powder turned her hands blue. When Corporal Baker confronted her, respondent told him that she was resigning. She claims that she was not allowed to leave the barracks, but was detained and questioned, and her hands were photographed.[6] She submitted the letter of resignation which she had been carrying with her, and eventually was permitted to leave.[7] J.A. 27, 32, 46-48, 98-104; Pet. App. 11a-12a, 68a-69a.

2. Respondent filed this action in the District Court pursuant to Title VII,[8] claiming that she had been "forced

[5]Respondent contended that the drawer was not assigned to anyone in particular, while others said that the drawer was assigned to another employee and contained her personal belongings. Pet. App. 11a-12a, 68a.

[6]The opinion of the Court of Appeals twice refers to respondent having been handcuffed, *see* Pet. App. 12a, 27a, but did not identify any source for this assertion. It does not appear in the District Court's opinion, in the complaint, or in any of the evidentiary materials, including respondent's own deposition, submitted on summary judgment.

[7]Sergeant Easton testified that, after respondent was questioned about the blue on her hands, she was told to take the rest of the evening off. Pet. App. 68a.

[8]In addition to her claim of sex discrimination under Title VII, respondent also raised claims of age and political affiliation discrimination, and sought relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Pennsylvania Human Relations Act, Pa. Cons. Stat., tit. 43, § (continued...)

to endure an insulting and humiliating work environment and ... forced to suffer a termination of employment." Pet. App. 69a (quoting complaint). After discovery, the petitioner moved for summary judgment, which the District Court granted.

The District Court, viewing the facts in the light most favorable to respondent, held that genuine issues of material fact remained on the issue of whether respondent had been subjected to a hostile work environment. Pet. App. 74a-77a. Nevertheless, the District Court granted judgment to the petitioner, on the ground that even if a hostile environment existed, petitioner had established an affirmative defense to vicarious liability for its supervisors' actions. The District Court relied on *Faragher v. City of Boca Raton, supra*, which recognized an affirmative defense against claims of "an actionable hostile environment created by a supervisor ... [w]hen no tangible employment action is taken."

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

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[8](...continued)
951 *e t seq.* She sued, in addition to petitioner, Sergeant Easton, Corporals Baker and Prendergast, and Ms. Smith-Elliot. Pet. App. 69a. The District Court resolved all of these claims against respondent. *See* Pet. App. 70a-74a, 80a-81a. Respondent appealed, however, only as to the Title VII sex discrimination claim against the State Police. Pet. App. 15a-16a.

Pet. App. 77a, *quoting Faragher*, 524 U.S. at 807-08. *See also Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765 (same).

The District Court held that petitioner had in place both an anti-harassment policy and a corrective mechanism, that respondent was aware of both, but that she had not attempted to take advantage of them until two days before she resigned; thus, "the [petitioner] was never given the opportunity to respond to any complaints of sexual harassment." Pet. App. 80a. The District Court therefore concluded that respondent had "failed to avail herself of [petitioner's] internal procedures for reporting any harassment," and granted petitioner's motion for summary judgment. *Ibid.* The District Court did not separately address respondent's claim that her resignation as the result of the hostile environment was in reality a constructive discharge.

3. The Court of Appeals reversed the District Court's judgment. The Court of Appeals found two "fundamental[] flaws," Pet. App. 20a, in the District Court's analysis. First, the Court of Appeals held that it was "unclear whether the PA State Police exercised reasonable care to prevent or correct the sexual harassment that Suders claimed she suffered," and that these material disputes of fact precluded summary judgment on the petitioner's affirmative defense to the hostile environment claim. *Ibid.*

Second, "and more importantly," the District Court had failed to consider respondent's claim of constructive discharge. *Ibid.* The Court of Appeals first held that, on the record presented for summary judgment, a jury might find that respondent had in fact been constructively discharged. Pet. App. 26a-28a. The Court of Appeals then considered whether petitioner should be permitted to assert the *Ellerth/Faragher* affirmative defense to this claim.

> *Ellerth* and *Faragher* hold that an employer is strictly liable to a victimized employee for the harassment or discrimination of its supervisors if the harassment or discrimination resulted in a tangible employment action. In that case, an employer is precluded from invoking the affirmative defense. If, however, the harassment or discrimination did not amount to a tangible employment action, the employer is entitled to assert the affirmative defense.

App. 28a. The Court of Appeals thus turned to what it called the "critical issue in this case: whether a constructive discharge, when proved, constitutes a tangible employment action." Pet. App. 28a-29a. After an extensive discussion, *see* Pet. App. 28a-57a, the Court of Appeals concluded that it does.

The Court of Appeals first "recognize[d] a division among the Courts of Appeals as to this issue." Pet. App. 39a. Both the Second and the Sixth Circuits had held that a "constructive discharge does not constitute a 'tangible employment action' as that term is used in *Ellerth* and *Faragher*." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), *quoted at* Pet. App. 39a. *Accord Turner v. Dowbrands Inc.*, 2000 WL 924599 (6th Cir. 2000)(unpublished), *cited at* Pet. App. 40a-41a. The Eighth Circuit, on the other hand, had held that a constructive discharge does constitute a "tangible employment action." Pet. App. 41a-42a, *citing Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) and *Jackson v. Arkansas Dep't of Ed.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002). The Court of Appeals noted that district courts which had addressed the issue were likewise divided. Pet. App. 42a (collecting cases). Finally, both the Seventh and the Ninth Circuits had recognized, but not decided, this issue. Pet. App. 42a-43a, *citing Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 n. 8 (9th Cir. 2001) and *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 666-67 (7th Cir. 2001).

In a lengthy discussion, *see* Pet. App. 45a-53a, the Court of Appeals rejected the reasoning of *Caridad* and similar cases as unpersuasive. The Court of Appeals proceeded to its own analysis, and concluded that a constructive discharge does constitute a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. Where a constructive discharge has occurred, then, the employer may not assert the *Ellerth/Faragher* affirmative defense; and if the existence of a constructive discharge is in dispute at the summary judgment stage, the employer may not seek summary judgment on the basis of the affirmative defense. Pet. App. 57a.

In reaching its conclusion, the Court of Appeals relied primarily on the idea, established in circuit precedent, that a constructive discharge is the "functional equivalent of an actual termination." Pet. App. 50a, *citing Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir.1996). A constructive discharge, like a formal termination, constitutes a "significant change in employment status," and inflicts "direct economic harm" on the employee, Pet. App. 50a; and these, in the Court of Appeals' view, are the "primary attributes" of a "tangible employment action." Pet. App. 54a. The Court of Appeals also thought that imposing strict liability on employers for constructive discharges would "encourage employers to be watchful of sexual harassment ... and to remedy complaints at the earliest possible moment," Pet. App. 56a; while the contrary holding could have the "perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment." Pet. App. 55a.

The Court of Appeals conceded that the elements of a constructive discharge overlap with the elements of the *Ellerth/Faragher* affirmative defense. Pet. App. 58a. Establishing a constructive discharge entails an enquiry into whether the employee's decision to resign was reasonable, and therefore

> it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs. These are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*.

Ibid. Thus, there is a "substantial risk" that evidence amounting to the affirmative defense might come in through the "back door," even in cases where, under the Court of Appeals' approach, the affirmative defense is not available. Pet. App. 58a-59a. Nevertheless, the Court of Appeals discounted this risk, confident that the "wisdom and expertise of trial judges," Pet. App. 60a, would enable them to deal with these "thorny evidentiary issues." Pet. App. 58a.

SUMMARY OF ARGUMENT

1. a. The text of Title VII expresses Congress' intention that the courts should look to principles of agency law to determine the scope of employers' liability for acts of sexual harassment committed by supervisors. The Court, applying these agency principles in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), has held that an employer is subject to automatic vicarious liability for "tangible employment actions" such as firings, demotions or changes in benefits. Tangible employment actions are

those which fall within the "special province of the supervisor ... as a distinct class of agent," and effect a change in employment status which only a supervisor can cause. It is therefore beyond question that, in taking such actions, a supervisor is aided by the agency relationship, and under principles of agency law, it is appropriate that the employer be held vicariously liable for such actions.

The agency status of a supervisor's actions is less clear, however, where the supervisor creates a hostile work environment but does not take any tangible employment action. A hostile environment is not the kind of injury which can only be inflicted by a supervisor, but can also be inflicted by co-workers, and it lacks the indicia of official action which typically mark tangible employment actions. In such cases, therefore, the rule of vicarious liability is relaxed by subjecting it to an affirmative defense which allows the employer to avoid liability by showing that it made reasonable efforts to prevent and remedy the harm, and that the employee failed to make reasonable efforts to avoid it.

b. A claim of constructive discharge adds nothing to this agency analysis and should therefore not affect the availability of the affirmative defense one way or the other. The fact that an employee feels compelled to quit his or her job in response to intolerable sexual harassment does not change the nature, for purposes of agency law, of the supervisor's underlying conduct which resulted in the resignation. If the supervisor merely created a hostile environment but did not take any tangible employment action, then the employee's resignation should not deprive the employer of the affirmative defense which would otherwise be available. By the same token, if the affirmative defense would not otherwise have been available — that is, if the employee's resignation resulted from conduct which was itself a

tangible employment action — then the employee's resignation should not serve to resurrect that defense.

c. In reaching a contrary result, the Court of Appeals failed properly to apply the agency principles which underlie Title VII and which are central to the Court's analysis in *Ellerth* and *Faragher*. The approach of the Court of Appeals leads to the absurd result that the same actions of a supervisor are viewed as either aided by the agency relationship or not, depending entirely on whether the employee responds to them by resigning.

2. In this case, respondent claims that she suffered a hostile work environment, but has never claimed that her supervisors took any tangible employment action to which her resignation was a response. There has never been any question that, but for her claim of constructive discharge, petitioner could properly interpose the affirmative defense to her hostile environment claim, and the same should be true as to her constructive discharge claim.

ARGUMENT

I. When a Hostile Work Environment Created by a Supervisor Results in the Constructive Discharge of an Employee, the Employer Should Be Allowed to Assert the Affirmative Defense Recognized by *Ellerth* and *Faragher*.

A. Under the agency principles which underlie Title VII, claims that a supervisor created a hostile work environment, without more, are subject to an affirmative defense by the employer.

It has long been settled that Title VII's prohibition against sex discrimination is not limited to acts of

"tangible" or "economic" discrimination, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), but also encompasses so-called "hostile environment" discrimination: acts of sexual harassment "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'" *Id.*, at 67 (brackets omitted); *cf.* 42 U.S.C. § 2000e-2(a)(1) (forbidding sex discrimination in "terms, conditions or privileges of employment"). *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998). Nevertheless, the Court has rejected the idea that Congress intended for employers to be "always automatically liable" for sexual harassment committed by their employees, even when those employees are supervisors. *Meritor*, 477 U.S. at 72. Rather, the text of Title VII — which defines "employer" to include any "agent" of an employer — "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Ibid.* Congress, the Court concluded in *Meritor*, "wanted the courts to look to agency principles for guidance in this area." *Ibid.* The Court cited generally to the Restatement (Second) of Agency §§ 219-237 (1958) ("Restatement"), while noting that "common-law principles may not be transferable in all their particulars to Title VII." *Ibid.*

The Court returned to the question of employer liability for supervisors' actions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), decided the same day, both of which involved claims of hostile environments created by sexual harassment from

supervisors.[9] The Court repeated that the rules on employer liability should be informed by the "traditional principles of the law of agency" which underlie Title VII, *Faragher*, 524 U.S. at 791, and again cited the Restatement as an "appropriate starting point." *Id.* at 803 n.3; *Ellerth*, 524 U.S. at 755 (Restatement is "useful beginning point"). The Court noted that, under the Restatement, employers are liable for the torts of employees acting within the scope of their employment, but also noted "[t]he general rule ... that sexual harassment by a supervisor is not conduct within the scope of employment." *Ellerth*, 524 U.S. at 757; *see Faragher*, 524 U.S. at 793-801.[10] The Court found more relevant the idea that an employer is liable for an employee's intentional tort when the employee was "'aided in accomplishing the tort by the existence of the agency relationship.'" *Ellerth*, 524 U.S. at 759, *quoting* Restatement § 291(2)(d); *Faragher*, 524 U.S. at 801 (same).[11]

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[9]The Court has never squarely addressed the standards for employer liability for harassment by co-workers. The Court has noted, however, that the lower courts have "uniformly" required a showing of employer negligence. *Faragher*, 542 U.S. at 799 (collecting cases).

[10]In this case as well, the Court of Appeals rejected scope-of-employment as a basis for vicarious liability. Pet. App. 31a-32a n.10.

[11]Section 219(2) of the Restatement provides that:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless:
>
> * * * *
>
> (d) the servant purported to act or to speak on behalf of

(continued...)

The Court then identified a category of cases where, "beyond question," the supervisor is aided by the existence of the agency relation: "when a supervisor takes a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760. A "tangible employment action"[12] is one which effects "a significant change in employment status," such as hiring, firing, promotion, a significant change in job responsibilities or a significant change in benefits, *id.*, at 761, and it typically inflicts "direct economic harm." *Id.*, at 762.

More importantly, for purposes of agency law a tangible employment action is different in kind from, say, a physical assault or simple offensive conduct, which can be inflicted by anyone. A tangible employment action, by contrast, is the sort of injury which "*only* a supervisor, or other person acting with the authority of the [employer], can cause." *Ibid* (emphasis added). "Tangible employment actions fall within the special province of the supervisor ... empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." "Tangible employment actions are the means by which the supervisor brings the *official* power of the enterprise to bear on subordinates." *Ibid* (emphasis added).[13] Thus, there is "assurance the injury

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[11](...continued)
> the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

[12]The Court "imported" the concept of a "tangible employment action" from numerous lower court cases involving claims of discrimination. *Id.*, at 761.

[13]The Court noted as well other indicia of a tangible employment action: "The decision in most cases is documented

(continued...)

could not have been inflicted absent the agency relation," *id.*, at 761-762, and agency principles therefore support subjecting the employer to vicarious liability for such injuries.

Where supervisor harassment does not involve a tangible employment action, however, the application of agency principles is "less obvious." *Id.*, at 763. On one hand, "there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship," if only because "an employee cannot check a supervisor's conduct in the same way that she might deal with abuse from a co-worker." *Faragher*, 524 U.S. at 802-803. *Ellerth*, 524 U.S. at 763 ("[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor is always aided by the agency relation.") On the other hand, acts of harassment by a supervisor might be the same as those which a co-worker might commit, *ibid*, and they might likewise lack the indicia of "official" action which mark tangible employment actions.

The Court resolved this tension by rejecting a rule of strict or automatic vicarious liability. An employer is subject to vicarious liability for a hostile environment created by a supervisor. That liability, however, is subject to an affirmative defense, which has two parts: 1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and 2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities

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[13](...continued)
in official [employer] records, and may be subject to review by higher level supervisors. ... The supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Ibid.*

provided by the employer or to avoid harm otherwise." This resolution honored *Meritor's* holding that Congress did not intend for employers to be "always automatically liable" for their employee's actions, accommodated the agency principles which underlie Title VII, and furthered Title VII's policies of encouraging conciliation, deterrence, forethought by employers and saving action by employees. *Faragher*, 524 U.S. at 764-765; *Ellerth*, 524 U.S. at 807-808.

It is clear, then, that agency principles support the imposition of automatic vicarious liability for a supervisor's tangible employment action, because only a supervisor can inflict such injuries; that is, in such cases there is "assurance the injury could not have been inflicted absent the agency relation." *Ellerth*, 524 U.S. at 761-762. And it is equally clear that no such assurance exists where a supervisor creates a hostile work environment but does no more; in that case, agency principles require that the rule of vicarious liability be relaxed by allowing the *Faragher/Ellerth* affirmative defense. We now turn to the proper application of these principles where a supervisor's harassment culminates, not in any action by the supervisor, but in a resignation by the employee, that is, in a constructive discharge.

B. An employee's resignation in reaction to a hostile work environment does not change the nature of the supervisor's actions for purposes of agency law.

The concept of constructive discharge first appeared in cases arising under the National Labor Relations Act, 29 U.S.C. §§ 151-169, alleging unfair labor practices motivated by anti-union animus, *see generally* Roslyn C. Lieb, *Constructive Discharge under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern over Motives*, 7 Indus. Rel. L.J. 143 (1985); *Sure-Tan, Inc.*

v. NLRB, 467 U.S. 883, 894 (1984); and it has come to be applied in a variety of employment contexts, including Title VII and other federal anti-discrimination statutes. *See, e.g., Calcote v. Texas Educational Foundation*, 578 F.2d 95 (5th Cir. 1978) (Title VII racial discrimination); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985) (Age Discrimination in Employment Act); Steven D. Underwood, *Comment, Constructive Discharge and the Employer's State of Mind: A Practical Standard*, 1 U. Pa. J. Lab. & Emp. L. 343, 343-344 & n.4 (1998)(collecting cases). While the specific elements of a constructive discharge vary considerably from one court to the next, the factor common to all is that "the working conditions be sufficiently intolerable that a reasonable person objectively would have felt compelled to resign." Practicing Law Institute, *The Employment-at-Will Doctrine: Have Its Exceptions Swallowed the Rule?*, 650 PLI/Lit 577, 742 (2001). *See* Pet. App. 25a (plaintiff alleging constructive discharge must prove "harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign").

The question in this case is whether such a resignation should have any effect on the availability of the *Ellerth/Faragher* affirmative defense. We submit that it should not, because an employee's resignation adds nothing to the agency analysis on which the affirmative defense depends.

The purpose of the analysis in *Ellerth* and *Faragher*, and of the affirmative defense to which it gave rise, is to provide a principled basis for limiting employer liability for the actions of supervisors, and thus to effectuate the agency principles on which Title VII is based. Under those principles, an employer's vicarious liability for a supervisor's actions is automatic only where, "beyond question," there is assurance that the supervisor was aided in his or her actions by the existence of the agency

relation.[14] *Ellerth*, 524 U.S. at 760. That assurance is present when a supervisor takes a tangible employment action, for such actions — firings, demotions, transfers and so forth — cannot be taken absent the agency relationship. *Id.*, at 761-762. Where a supervisor merely creates a hostile work environment, however, that assurance is not present, *id.*, at 763, and it does not suddenly appear just because the employee resigns.

Whether a supervisor's actions are aided by the agency relation depends on what it is that the supervisor does, not on what the employee does. It would be absurd to hold that, if an employee resigns in response to supervisor harassment, then the supervisor's actions were aided by the agency relationship, but that if the employee decides to remain, then the same actions were *not* aided by the agency relationship. The issue under agency principles is the nature of the *supervisor's* actions, and the employee's resignation, whether reasonable or not, simply provides no information on the aided-by-the-agency-relation question.

In fact, it is clear that harassment which leads an employee to resign is not the kind of injury which "only a supervisor ... can cause," or which falls within the "special province of the supervisor ... as a distinct class of agent." *Ellerth*, 524 U.S. at 762. To the contrary, such harassment, like any other offensive behavior, can be inflicted by an employee's co-workers as well as by his or her supervisor. *Caridad v. Metro-North Commuter R.R.*,

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[14]Or where some other agency standard has been satisfied. In *Faragher*, the Court noted that vicarious liability is automatic where the harasser is "within that class of officials who may be treated as the organization's proxy." 524 U.S. at 789-790, *citing Harris*, 510 U.S. at 19 (harasser was employer's president) and other cases.

191 F.3d 283, 294 (2d Cir. 1999); *see Oncale*, 523 U.S. at 77 (employee forced to quit after repeated assaults and threats of rape from co-workers); *Ellerth*, 524 U.S. at 762 ("A co-worker can break a co-worker's arm as easily as a supervisor...."). In addition, the supervisor's actions in creating the hostile environment will continue to lack the indicia of official action which mark tangible employment actions — documentation in official records, review by superiors, and so on, *see ibid* — whether or not the employee feels compelled to resign. *See Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 33 (1st Cir. 2003) ("all of [the supervisor's] conduct was exceedingly unofficial and involved no direct exercise of company authority. ... [It] is exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed.")

While it is true, as the Court of Appeals pointed out, Pet. App. 54a, that an employee's resignation effects a significant change in employment status, this cannot be dispositive for two reasons: first, because this change comes about as the result of the employee's own decision, rather than from the direct action of the supervisor, *cf. Ellerth*, 524 U.S. at 762 (tangible employment action typically inflicts "*direct* economic harm"); and second, because the same thing would be true if the resignation was in response to harassment from co-workers.

Finally, preserving the affirmative defense in cases where a hostile environment culminates in a constructive discharge will also further the statutory goals of encouraging employers to maintain anti-harassment policies and internal grievance mechanisms, encouraging conciliation rather than litigation, and encouraging employees to report problems sooner rather than later. *See Faragher*, 524 U.S. at 764-765; *Ellerth*, 524 U.S. at 807-808. Allowing employees to cut off the affirmative defense by resigning, on the other hand, will provide

them with an incentive to do just that, as well as providing an incentive to justify such resignations by hoarding and exaggerating their grievances rather than attempting to resolve them. For all these reasons, a claim of constructive discharge should not eliminate an employer's *Ellerth/Faragher* affirmative defense where it would otherwise exist.

By the same token, where the affirmative defense would *not* otherwise exist, it should not be allowed to reappear merely because the employee has been provoked into resigning. One Court of Appeals has suggested, and another has held, that where a constructive discharge results, not merely from a hostile environment, but from something which is itself a tangible employment action, the affirmative defense should not be available. In *Reed v. MBNA Marketing Systems, Inc., supra*, the First Circuit suggested that the affirmative defense might be precluded in cases where "*official* job actions ... make employment intolerable." 333 F.3d at 33 (emphasis in original).

The Seventh Circuit confronted such a situation in *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). In *Robinson*, a higher-level supervisor transferred an employee away from the immediate supervisor who had been harassing her, but into an "equally cruel working situation" which the higher-level supervisor knew would make the employee's life "hell," and in response the employee resigned. *Id.*, at 320-325, 337. The Seventh Circuit held that

> Ms. Robinson's constructive discharge may be considered a tangible employment action for purposes of the *Ellerth/Faragher* affirmative defense. This was not simply a situation in which a supervisor was inflicting harassment on a subordinate. In this case, Judge Greanias, in his capacity as presiding judge,

> took the official action of transferring Ms. Robinson to Judge Francis.... The transfer was only possible because Judge Greanias "ha[d] been empowered by the [employer] ... to make economic decisions affecting other employees under his or her control."

Id., at 337. Accordingly, the Seventh Circuit held that the affirmative defense was not available.

While this case does not present a similar situation, we submit that the analysis of *Reed* and *Robinson* is sound, and is entirely consistent with the analysis we have presented here. Whether a harassed employee resigns has nothing to do with whether the underlying conduct of the supervisor was or was not aided by the agency relationship, and therefore should not affect the availability of the affirmative defense one way or the other.

C. The contrary reasoning of the Court of Appeals fails to follow the agency principles which underlie Title VII.

In holding otherwise, the Court of Appeals paid little or no attention to the agency principles which were the centerpiece of the Court's analysis in *Ellerth* and *Faragher*. Thus, the Court of Appeals found it unpersuasive that a constructive discharge "may not bear the imprimatur of the enterprise," Pet. App. 49a-50a (internal quotation marks omitted), and found it irrelevant that a constructive discharge could be caused by harassment from co-workers as well as from a supervisor.[15] Pet. App. 48a. Rather, the Court of Appeals

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[15]The Court of Appeals made the odd suggestion, without citing any authority for it, that this Court had recognized that (continued...)

focused almost entirely on the harm caused by a constructive discharge, as seen from the perspective of the employee: what mattered, in the Court of Appeals' view, was that a constructive discharge "constitutes precisely the same sort of significant change in employment status and inflicts the same sort of economic harm as any other firing." Pet. App. 50a, *quoting Cherry v. Menard, Inc.*, 101 F.Supp. 2d 1160 (N.D. Iowa 2000) (internal quotation marks omitted).

But under the analysis of *Ellerth* and *Faragher*, what matters is not the nature of the harm experienced by the employee, but whether the supervisor was aided by the agency relationship in inflicting it; and this in turn is informed largely by whether it is the sort of harm which "only a supervisor ... can cause," or which falls within the "special province of the supervisor ... as a distinct class of agent." *Ellerth*, 524 U.S. at 762. The Court of Appeals' approach is thus at odds with that of *Ellerth* and *Faragher*. Moreover, as we discussed above, the Court of Appeals' approach has the decidedly odd result that the same actions by a supervisor may or may not give rise to the affirmative defense, depending entirely on whether the employee does or does not resign and claim a constructive discharge. Whatever else may be said about this result, it surely has no roots in principles of agency law.

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[15](...continued)
"many tangible employment actions may be perpetrated by either supervisors or co-workers," and listed "obscene gestures, lewd comments, sexual propositions, [and] stealing ... clients" as examples. Pet. App. 48a. But surely none of these qualifies as a tangible employment action. Moreover, the Court of Appeals' observation cannot be reconciled with this Court's statement that tangible employment actions are those which "fall within the special province of the supervisor ... as a distinct class of agent." *Ellerth*, 524 U.S. at 762.

This approach also results in prolonged uncertainty about the legal rights and obligations of both employers and employees. As this case illustrates, the existence of a constructive discharge will often turn on disputed issues of fact which cannot be resolved until trial. *See* Pet. App. 26a-28a. Under the Court of Appeals' approach, if respondent proves her constructive discharge claim to the satisfaction of the jury, petitioner will not be allowed to invoke the affirmative defense. But if she does not, she will still be left with a hostile environment claim, to which the affirmative defense *will* apply. The Court of Appeals does not explain how the District Court and the jury are to proceed, nor how the parties are to develop rational trial or settlement strategies, in light of this uncertainty.

Finally, the Court of Appeals thought that allowing the affirmative defense in cases like this one would provide a perverse incentive for employers to turn a "blind eye" to sexual harassment, or even to "tacitly approve of increased harassment," in order to get an employee to quit. Pet. App. 55a-56a. The logic of this suggestion, however, is hard to follow, since an employer which followed this course of action would change its litigating position only for the worse. First, such an employer would gain nothing in terms of the affirmative defense: as we explained above, an employee's resignation is irrelevant to the availability of the affirmative defense, which is available, or not, based entirely on the underlying conduct of the supervisor. Certainly, an employer would never be entitled to assert it, as the Court of Appeals seemed to suggest, *because* an employee resigned. Second, such an employer would increase its exposure to damages, by adding a claim for lost wages to whatever damages were caused by the underlying hostile environment. An employer which faces a constructive discharge claim is therefore never better off, but only worse off, than it would otherwise be, and

the perverse incentive which the Court of Appeals feared simply does not exist. Rather, the approach we have suggested leaves intact the structure of incentives which the Court identified in *Ellerth*, 524 U.S. at 764, and *Faragher*, 524 U.S. at 806-807, for employees to report and for employers to remedy sexual harassment sooner rather than later.

II. Respondent's Resignation Resulted from a Hostile Work Environment Rather than from a Tangible Employment Action.

As we explained above, the availability of the affirmative defense should depend not on the fact of a constructive discharge, but on the nature of the underlying conduct which provoked it. Where the constructive discharge results from a tangible employment action (such as an abusive transfer or demotion) — that is, where the affirmative defense would not otherwise be available — it should remain unavailable. But where the constructive discharge results from a hostile work environment which has not culminated in a tangible employment action — that is, where the affirmative defense would otherwise be available — it should remain available.

That is the case here. It is clear that, but for respondent's claim of constructive discharge, respondent could properly interpose the affirmative defense. There has never been any suggestion that the hostile environment which respondent allegedly suffered culminated in any tangible employment actions, or that petitioner is not entitled to assert the affirmative defense as to petitioner's hostile environment claim. To the contrary, the District Court held that respondent was entitled, not merely to assert the affirmative defense, but to summary judgment on it, Pet. App. 77a-80a; and while the Court of Appeals held that disputed issues of fact

required that the affirmative defense be submitted to a jury, Pet. App. 20a, neither the Court of Appeals nor respondent suggested that petitioner was not entitled to assert it. Petitioner should therefore be permitted to interpose the affirmative defense as to respondent's constructive discharge claim as well.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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January 20, 2004

No. 03-95

MAR 1 - 2004

IN THE

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA STATE POLICE,
Petitioner

v.

NANCY DREW SUDERS,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Nancy Suders lives in McConnellsburg, a small town located in rural Fulton County, Pennsylvania. She is a relatively young grandmother, who raised three children, and devoted her entire life to her family and her community. As a loyal and active Republican Committeewoman she was also involved, on a local level, in the politics of Fulton County. On or about 1997, Nancy, who had worked for many years as Deputy Sheriff in Fulton County, where she essentially ran the office, was approached by her Republican Chairman and asked to apply for a position as a public communications officer in the Pennsylvania State Police (PSP) barracks in McConnellsburg, Record 55, Suders' Depo. Pgs 10-13 . After discussions with family, the sheriff, and friends, Nancy Suders decided to give the job try, Record 55, Suders' Depo. Pg 13. After submitting her application, Nancy was approved and reported to work on March 21, 1998, Record 55, Suders' Depo. Pg 13; Record 56-58, Suders' Depo. Pgs 23-24. For reasons that are not entirely clear, the PSP cadre at the McConnellsburg barracks didn't want her, Suders' Depo. App 64-66; 89. The record indicates they wanted to make their own selection.

The advantages to the job were many. It paid considerably more than the deputy sheriff's position Nancy held, and there were many opportunities for advancement Record 58, Suders' Depo pg 25; Record 59, Suders' Depo pg 26. Because of these attractive features, the local PSP cadre were opposed to Nancy taking the job. Simply put, they wanted to personally pick who worked under them. Shortly after Nancy began working, she was subjected to egregious treatment at the hands of her supervisors, Sergeant Easton,

and Corporals Baker and Prendergast who were defendants below. App 66-68, Suders' Depo; Record 86, Suders' Depo. Pg 137.

The harassment she suffered took many forms. But most of it was undoubtedly sexual in nature, App 93, Suders' Depo. From the evidence collected below, Nancy Suders suffered egregious sexual harassment over a period of many months at the hands of her supervisors until she could endure it no more, Record 83, Suders' Depo. Pg 122; Record 96, Suders' Depo. Pg 177. She was even approached, at times, in a seemingly solicitatious way, as if suggesting oral sex, that she viewed as in all likelihood, but another form of the persistent outrageous misconduct directed at her that was apparently meant to intimidate, threaten, ostracize, confuse, and offend her, so that she would be driven from the job, Suders' Depo: App 71, 73-74, 78, 81, 84-86, 99, 102. The supervisors eventually succeeded.

Sergeant Easton began by intimidating Nancy with the warning that whatever developed through her employment, it had would be her word against his, and he had friends in high places, App 71, Suders' Depo. This was said while Easton informed Nancy Suders that he had doubts about her, even though he was not acquainted with her, and had no experience with her as an employee, Suders' Depo: App 71-72, 84.

Suders alleges that Easton would constantly talk about bestiality, particularly on those occasions when Nancy had to go into his office, Suders' Depo: App 70, 73, 82, 93. And Easton would roll up to her in his office chair, while wearing spandex shorts, and would lean back with his hands behind his head and spread his legs, App 70, Suders' Depo. She was offended, intimidated, and frightened, and would

move away, Suders' Depo: App 70, 73. On one occasion, which was particularly upsetting to Nancy, Easton and Prendergast had a discussion in Nancy's presence where they discussed their views on parenting, saying that " if someone had a daughter they should teach her how to give a good blow job" ostensibly because that would bring her success in life, and cause her to be accepted, Suders' Depo: App 72, 82. Prendergast, a self-styled ladies man would persistently asked Suders what her daughter's name was, Suders' Depo: App 90-91. This was obviously meant to frightened and intimidate Suders. Prendergast had a reputation for liking young girls, App 91, Suders' Depo.

This type of occurrence, involving all three individual petitioners, was common, being essentially a daily happening Suders' Depo: App 75, 83-84. Corporal Baker would engage in what he called a "wrestling move" where he would cross his arms at the wrist in front of his body, and taking his genitals in his hands, would scream out "suck it", Suders' Depo: App 67, 74-76. According to Suders he would do this as often as a half a dozen times a shift, frequently jumping from a sitting position to his feet, or up onto a chair, to perform the act, Suders' Depo: App 75, 77. Although Baker denied doing this, along with talking about his wife's breasts and getting his penis pierced, App 81, it was witnessed by a number of other people Record 70, Suders' Depo. Typically though, Nancy, would be at the barracks on a later shift, and she would be there with the petitioners by herself App 67, Suders' Depo. Baker would even ask Suders, who he dubbed the "Nancinator" as a way to harass her, to perform the 'wrestling move" as he did, Suders' Depo: App 74-75. Her protestations to him about

this, and other misconduct, were ignored, Suders' Depo: App78-79.

Prendergast, another Corporal, would also engage in harassing conduct. It is alleged that Prendergast was proud of being likened to a Nazi storm trooper. According to Suders he would wear thin black leather gloves and he would sometimes pound things, bringing his fist down with great force on furniture and cabinets so as to frighten her. While supervising Nancy, Prendergast would position himself so that he could watch TV and look, to his right, directly at Nancy as she worked all the while telling her that he didn't trust her, Suders' Depo: App 73, 84-85, 88-90. He would do this sometimes for hours, or a whole shift. This was terribly unnerving and intimidating. The aforementioned behavior by all the individual petitioners was persistent and pervasive, and it was by no means exclusive, App 99, Suders' Depo; Record 83, Suders' Depo. Pg 122; 85 Suders' Depo. Pg 132.

For example, Baker would call Nancy "momma" knowing she was offended by this, App 69, Suders' Depo. Easton also belittled Nancy about her age on a number of occasions. More than once Nancy had seen at least one of her supervisors with some of the much younger ladies in the barracks in their embrace, including pressing their bodies up against them against the wall, Suders' Depo: App 91-92.

Nancy Suders alleges she had no way, or where, to go to complain to her immediate supervisors, the individual supervisor defendants below, Suders' Depo: App 75, 82. Although they were her supervisors, and directly above her in the chain of command, they were her tormentors also. She could not trust or rely upon them, and, of course, she could not confide in them or seek their counsel, App 75, Suders' Depo. She had privately consulted her husband, and some

close friends and associates, about what to do, App 82, Suders' Depo.

One result was that she took a test which she hoped would enable her to move to a barracks approximately 50 mi. to the north, so that she could escape the mistreatment she was suffering. However, when she repeatedly asked for the test results, or whether it had been graded or returned, she was told it had been mailed in and her supervisors had not heard back, App 115, Suders' Depo; Record 90-91, Suders' Depo. One night, as Nancy was using the ladies room, which contained a dresser with unmarked drawers, a commode, a sink, and a bed, she noticed a drawer partly opened and was curious of its contents. Upon opening the drawer, which had thong bikinis, fancy bras, and lingerie in it, Nancy noticed a manila envelope which resembled the envelope she had put her test in. She removed it from the drawer and quickly discovered it contained her test, App 117, Suders' Depo. This was the same test she had turned into her supervisors, and which she had been told had been submitted for review to the headquarters above. Because of the environment at the barracks that night Nancy could not return the test to the drawer right away. She retained the test, which she believed to be her property and placed blank paper in the manila envelope, App 119, Suders' Depo. The next time she came to work she attempted to return the manila envelope to the dresser drawer in the ladies room.

Meanwhile, Nancy Suders was able to reach the PSP anti- discrimination and affirmative action officer Major Virginia Smith Elliott, Suders' Depo: App 83, 88, 94, 95. She called looking for help, Suders' Depo: App, 95, 96, 102. Ms. Elliott remembers that Nancy called her, Virginia Smith Elliot Depo: Record 263, 264. She remembered that Nancy

had complained about mistreatment but could not recollect whether Nancy had mentioned sexual harassment explicitly, App 54, Suders' Depo; Record 52, Suders' Depo. Her testimony is nonetheless telling. Aside from telling Nancy to look up a form she did nothing, App 96, Suders' Depo. Nancy remembered that Ms. Elliott was uninterested, and didn't care anything about her, Suders' Depo: App 96, 97; Record 96, Suders' Depo. Suders, not receiving any help from Elliott, found a form, □lbeit not the correct one, but in good-faith submitted it anyway, App 97, Suders' Depo; Record 96, Suders' Depo. Elliott could only testify that the PSP sexual harassment policy would have been posted throughout the PSP system and that the form which purportedly could be used for filing a harassment complaint "would" be in manuals at the barracks, Suders' Depo: App 55, 56, 62; Record 270, Virginia Smith Elliot Depo. Nancy could not find the forms. She began to feel desperate, Record 96, Suders' Depo.

Feeling frightened and isolated, Nancy Suders had penned a resignation letter, and she had it in her purse the night that she attempted to return her test results, or rather the manila envelope, to the dresser drawer in the ladies room. Later, her supervisors would testify, that the dresser drawers in the ladies room had been assigned to individual staff members. Nancy emphatically denies that. At no time however, did they suggest that the test was not Nancy's, or that the dresser drawer was a filing cabinet, but they did decide to investigate Nancy. They dusted the ladies room with blue theft powder, even doing up the seat and handle on the commode the reason, for which has never been explained. They did this because they quite obviously knew that Nancy's test results had never been sent into

headquarters at all, that they had instead been secretly stored in the bathroom, presumably by one of the young lady staffers, at the behest of Nancy's supervisors, Suders' Depo: Record 90, 93. Regardless, Nancy first saw the theft powder when she noticed little droplets of blue in the commode, App 98, Suders' Depo; Record 92-93, Suders' Depo. But she didn't know what it was. And as she washed her hands to leave the bathroom her hands turned blue. Still confused, Nancy attempted to clean her hands when she was noticed by her supervisors, App 100-101, Suders' Depo.

What followed for Nancy Suders was a traumatizing nightmare. Sergeant Easton was called in. Nancy was questioned, she was read her Miranda rights, App 105, Suders' Depo. She consistently asked if she could leave. She was consistently told no, Suders' Depo: App 101, 105. She was unlawfully ordered to stay, and was told that she had committed a crime and would be prosecuted, Suders' Depo: App 101, 103-104; Record 95, Suders' Depo By this time Nancy was extremely afraid and in emotional turmoil, App 106, Suders' Depo. Her hands were badly shaking and she began to contemplate being taken off to jail and not being allowed to communicate with her husband, App 104, Suders' Depo. Nancy felt she couldn't take it anymore and resignation was a way out, App 101, Suders' Depo. So she produced the resignation letter attempting to use it as a bargaining chip for freedom, because she knew that her supervisor' s desire to get rid of her was behind what had happened to her, Suders' Depo: App 101, 105-106. Initially Baker had refused to accept the resignation letter, but after her rights were read to her, and she had been repeatedly threatened with criminal charges and prosecution, Easton

finally accepted the resignation letter and Nancy was allowed to leave.

She never heard another word about any criminal investigation or prosecution, Record 95, Suders' Depo. She contends that this is because the threats of criminal prosecution were totally baseless, as indeed the record indicates, since Nancy could hardly have been charged with stealing her own test papers, about which she had been lied to by these same supervisors, and which she had found in a lingerie drawer in the bathroom. The date was August 20, 1998, App 102, Suders' Depo.

At some time shortly after Nancy left the employee of the PSP and they became aware of her charges against the Department and her supervisors, they claim to have conducted an internal investigation, Record 230, Easton's Depo. Pg 71. In doing the investigation, according to the testimony of Sergeant Easton, petitioner PSP(the investigating officer was Lieutenant Charlie Way) interviewed Easton and the other defendants below. The PSP reached a conclusion that the allegations against Easton, Baker, and Prendergast were unfounded, Record 230, Easton's Depo. Pgs 72, 73. At no time did any PSP investigator even contact Nancy Suders for an interview, nor did they seek any recommendations for witnesses from her. The total respect paid by petitioner PSP to the allegations made by Nancy Suders was a secretive and truncated pseudo investigation which they refused to disclose in the litigation below. See Record 230, Easton's Depo. Pgs 71-73. This, despite the fact that it was Easton himself who placed Nancy Suders' test results in an envelope, which he then placed in a dresser drawer, in the lady's bathroom at the police barracks, Record 230, Easton's Depo. Pg 70. Easton even told one of

the young lady staffers, Stacey Gelvin, that he was placing Nancy s test results in the drawer. A few sentences later, on page 71 of his deposition (Record 230) Easton admitted he didn't know who's drawer was who's in the bathroom. If petitioner had discovered this during their so-called investigation, they would have had to conclude immediately that the criminal investigation and custodial detention of Nancy Suders was unlawful.

In any event, within a week of her August 20, 1998 constructive discharge, Nancy Suders had consulted with counsel and had called the Pennsylvania Human Relations Commission, which has an agreement with the EEOC to cross file claims. She was scheduled for a September intake session. The underlying litigation followed. Nancy was issued a right to sue letter once her initial complaint was filed in Federal District Court. It was predicated on 1st and 4th Amendment grounds, but ironically, only the Title VII action against petitioner survived. By the time this litigation arrived in the United States Supreme Court, the sole party remaining was the Pennsylvania State Police, pursuant to a Title VII claim, on a theory of vicarious liability. Suders alleged that a constructive discharge made it impossible for her to utilize purported PSP complaint procedures beyond the steps she took as described above. However, the District Court summarily dismissed Nancy's claim for an unreasonable failure to take advantage of alleged internal PSP policies, as per its interpretation of the affirmative defense available in *Faragher v. City of Boca Raton*, 529 U.S. 775 if (1998). The United States Court of Appeals for the Third Circuit reversed the District Court as follows: "...we hold that a constructive discharge, when proved, constitutes a tangible employment action within the meaning

of *Ellerth* and *Faragher*. Consequently, when an employee has raised a genuine issue of material fact as to a claim of constructive discharge, an employer may not assert, or otherwise rely on, the affirmative defense in support of its motion for summary judgment". Pet. App. 5a. The Third Circuit also held that there were disputed material facts as to the issue of Nancy Suders failing to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise(the second prong of the *Ellerth/Faragher* affirmative defense), "We hold that Suders has raised genuine issues of material fact relating to her claim of constructive discharge that preclude the grant of summary judgment." Pet. App 28a. See contra the opinion of the District Court at Pet. App. 80a-81a. The District Court had failed to even address the issue of constructive discharge expressly raised by respondent in her complaint.

SUMMARY OF THE ARGUMENT

Petitioner correctly states the law of *Ellerth/Faragher* when it argues that an employer is vicariously liable for " tangible employment actions" which " fall within the " special province of the supervisor ... as a distinct class of agent". Petitioner then argues that the situation is less clear when the supervisor creates a hostile work environment so severe that the employee is forced to resign because there is not an official firing. Respondent argues that the purpose of the affirmative defense is defeated when it is available to an employer whose supervisor causes a constructive discharge.

The Third Circuit opinion appealed from is extremely thorough, well argued, and impeccably annotated. To hold that a constructive discharge is a " tangible employment actions" is consistent with this Court's ruling in the *Ellerth/Faragher* cases even though it was not listed in the

litany provided. When addressing the affirmative defense The reason is simple. When this Court said " firing" it meant "a discharge" which, consistent with jurisprudence at federal and state levels throughout the nation, recognizes a constructive discharge as the functional equivalent of a "firing" or discharge.

Moreover, there is no logical reason, once a constructive discharge is proven, to categorize it differently from a sex discrimination firing. The Third Circuit opinion is well reasoned and should be adopted by this court. Respondent has found it to be impossible to improve on the Third Circuit opinion. The Petitioner is using this appeal opportunity to seek a more absolute defense for an employer to a supervisors harassment that forces an involuntary quitting by distorting the purpose of the affirmative defense in the *Ellerth/Faragher* cases by purporting to avoid Agency principles in favor of an "official act" analysis.

ARGUMENT

I. Introduction: Agency law and Title VII in *Ellerth/Faragher*, and whether this Court should hold that a constructive discharge, when proven, is a "tangible employment action".

The present case has its genesis in this Court's landmark decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U. S. 775 (1998). Hereinafter *Ellerth/Faragher* . More specifically, the cases at bar deals primarily with two holdings in those cases. What a "tangible employment action" is, *Ellerth*, 524 U.S. at 761-62, *Faragher*, 524 U.S. at

808, i.e. does it include constructive discharges, and the invocation of the affirmative defense promulgated therein, which in formal discharge cases, is denied, *Ellerth*, 524 US at 765; *Faragher*, at 524 U. S. at 807. The " Question Presented" is whether the affirmative defense is available to employer defendants in constructive discharge situations when proven. The Third Circuit Court of Appeals reversed the district court after it granted summary judgment against respondent holding that she had unreasonably failed to take advantage of an employer antidiscrimination policy. The district court never considered the concept of constructive discharge based upon its interpretation of *Ellerth/Faragher*, and the Third Circuit in response held that the district court erred for two reasons:

> " First, even if the PA state police could assert the affirmative defense, disputed issues of fact relating to the defense preclude summary judgment here. While the PA State Police contended that it had an effective remedial program in place to address sexual restaurant claims, Suders never found the complaint form necessary to trigger an investigation. Moreover, Suders contacted Smith Elliott twice. The first time, Suders alluded to potential problems and stated that she might need assistance. No attempt was made to follow-up on Suder's initial contact. The second time, Suders contended that Smith Elliott was entirely unhelpful, appearing insensitive at times. On this record it is unclear whether the PA State police

> exercised reasonable care to prevent or correct the sexual harassment that Suders claimed she suffered. Accordingly, the grant of summary judgment on the basis of the affirmative defense was improper.
>
> Second, and more importantly, the court did not consider Suders claim of constructive discharge and whether a claim of constructive discharge would affect the availability of the affirmative defense." Order appealed from Pet. App. 20a.

When petitioner appealed this matter, in stating its reasons for this court to grant the appeal, it correctly argued that the Circuits were divided over the issue of whether a constructive discharge is a "tangible employment action", because if it were it would bar the affirmative defense outlined in *Ellerth/Faragher*.

Petitioner now argues that a hostile environment injury, because it can be inflicted by co-workers, and not just by a supervisor, cannot be an intangible employment action as per *Ellerth/Faragher* because it's not an "official action" i.e. does not bear the "imprimatur of the enterprise", *Ellerth* 524 U.S. at 762.

This argument, whetted by this Court' s novel decision to impose a burden on employees under the second prong of the affirmative defense promulgated in *Ellerth/Faragher* (*Ellerth*, 524 U.S. at 765; *Faragher* 524 U.S. at 807-808) is really designed to circumvent *Ellerth/Faragher*, by suggesting a 'scope of employment' rule, or some similar construct to replace the clearly established vicarious liability "if aided by the agency relation standard", set forth in *Ellerth*, 524 U.S. at 759. It is clearly

an attempt by petitioner and their amicae to roll back this Court's integration of the Restatement (Second) of Agency section 219 (2), and agency principles, which was designed to accommodate vicarious liability implications and encourage employer responsibility where a supervisor egregiously mistreats or dismisses an employee, by converting the agency principles component of the law of Ellerth/Faragher into an "official act" analysis. And under that analysis employers would be held guiltless of their supervisors abuses no matter how horrific and no matter how destructive of the carrot approach used in the affirmative defense based ostensibly, on their being unauthorized to act by their supervisors. It is a circuitous argument where a supervisor is empowered to summarily dismiss an employee but ht employee cannot complain of the dismissal because the supervisors did not act with authority. It is, simply put, a tautology. It is an argument which hopes to do away with the use of the affirmative defense in hostile environment injury cases in favor of a scope of employment defense to be used against plaintiffs as an explanation for errant supervisors, i.e. it is a poorly disguised attempt to hold employers harmless for the acts of their supervisors where the employee is defenseless to do anything about it particularly where the supervisor, through harassment, forces an employee to quit against their will. Using the opportunity to address this court's definition of tangible employment action" to test whether that definition includes "constructive discharges" the petitioner and their amicae use the concept of the "official act" to climb out of the hole they are in, on a slant.

In other words petitioner's, and the Solicitor General's position, along with that of other amicus curiae

who support petitioner, is a collateral attack on this Court's unambiguous holding in the *Ellerth/Faragher* cases that agency principles apply in Title VII law, as authorized by Congress, and that pursuant thereto, vicarious liability can be imposed upon an employer (even where higher officials in the company are personally innocent of responsibility for creating the hostile environment), when a tangible employment action" (discharge) occurs as the final hostile act sexual-harassment case that creates, as here, a constructive discharge. They are using the simple holding of the Third Circuit that a proven constructive discharge is a tangible employment action to wedge the door open against any liability for the employer.

Title VII law becomes factually and legally more complicated at this point because the law typically separates hostile environment claims from simple discrimination claims i.e. where an employee is discharged because of their sex as opposed to where the employee is merely harassed and an ongoing private remedy is presumably being pursued. In a nutshell, a formal discharge in a hostile environment case denies an employer access to the E/F affirmative defense, because as a non-employee victim, the employee cannot utilize, or exhaust, any private remedies available. This is not to say or imply that there is any exhaustion requirement in the law for the private remedial scheme's of employers-there is none. On the other hand, should a "constructive discharge" be a tangible employment action? It has not been clear whether the affirmative defense is available as a defense to vicarious liability in such cases. The Circuits differ markedly. The Third Circuit has decided that the defense is not available, see Pet. App. 38a-43a.

The Supreme Court, intending to soften the impact of *Ellerth/Faragher* vicarious liability on employers and recognizing there should be some reward for employers who instituted good antidiscrimination programs and properly enforce them, placed the burden on employees to not only utilize those plans, but tangentially encourage those employees to stay on the job and use them in an effort to resolve administration of justice implications.

Recognizing the anomaly which occurs when an employee, who is discharged, is cut off from access to an employer's in-house procedures while pursuing, or prior to taking action to pursue, a private remedy with an employer who has a good plan in place, this court said no affirmative defense would be permitted in official act discharge situations. This Court categorized a discharge for discriminatory purposes as a tangible employment action along with a litany of other impermissible anti employment actions.

This Court's commonsense reasoning was plain to see. An employer who maintains a good antidiscrimination plan and vigorously enforces it, the Court reasoned, should be allowed to demonstrate that affirmative defense, even where potentially liable for a supervisor's actions , so as to permit the jury to find the employer per se, not responsible. Presumably the court assumed that the employee could achieve justice through state actions and/or reinstatement etc. or in other ways, and also apparently felt that a good-faith employer should not be the victim of a bad-faith supervisor where the employer has done everything it can protect the employee's rights including make available an in-house antidiscrimination procedure as a remedy. However, once

upon its availability is a contradiction in terms, and the High Court steps in and says no-the employer can't use that affirmative defense when it, or its agents, discharge a purported victim who ostensibly would make use of the private remedial scheme. Worthy of note here is that in Nancy's case the petitioner is a public employer, and although not at issue in this case, factually our Pennsylvania Courts contain numerous cases where victims claim that an incestuous network of good friends within the Pennsylvania State Police regularly cover up harassment against female employees. In this case, petitioners claim that they investigated the underlying matters, Record 230, and found there was no merit to Suders' allegations. If they did investigate, they never even contacted Nancy Suders for an interview.

Regardless, the visceral logic is simple, two wrongs don't make a right, and an employer, who in good faith, does all in its power to protect an employee from abusive supervisors, should not be excessively punished.

Respondent believes more could be done to defeat the scourge of abusive sexual harassment in the workplace, primarily of women employees by male supervisors who can't seem to understand how a woman feels and what she suffers, if the "aided by agency standard" were transformed into a strict liability standard. However, respondent understands that is not at issue here. But policy wise, such a standard would cause employers to do a far more comprehensive job than is being done now across the country to defeat discrimination and protect our female workforce. The human costs, let alone the economic damage done to our economy by unproductive litigation in this field,

more of a legislative issue which is not the province of our courts who have labored diligently to deal with these conflicting private and governmental interests.

In sum the question before this court may be simpler than the parties and their advocates make it appear. As a matter of commonsense, it seems difficult to impossible to expect an employee to use an employer's antidiscrimination procedures when they've been dismissed. As a non-employee, how can they utilize the procedural advantages of an employer's plan? The fact is they can't. So it's simple to understand that if the employee has been formally fired, either as a result of a simple sex discrimination act or as an ultimate form of sexual harassment, she can't use the employers antidiscrimination plan to vindicate her rights. And so it simply follows that the employer can't assert the affirmative defense where one of the components of the affirmative defense rests on the employee's affirmative burden to utilize an employer's plan she doesn't have access to. Thus, no one who addresses this issue would dare suggest, for fear of sounding foolish, that where the employee is formally fired she should be required to respond to an affirmative defense she could not possibly defeat. Commonsense, simple logic. Naturally, the Supreme Court knew what it was doing when it devised the affirmative defense. And of course it assumed that the worker would be on-the-job to take advantage of an antidiscrimination plan, and that if the employee didn't, they ran the risk of having to explain why they didn't do so to a fact finder. The idea ensconced two goals. Not just resolving sexual harassment problems in the workplace but mitigating the problems before they became severe. And, as referred to above, the idea was to encourage the nation' s employers to address a

growing workplace problems. An expected tangential benefit would be a positive impact on the administration of justice. While agency principles served as a legal fiction to ensure employer compliance with the law's practical and policy objectives, through insisting that employers take responsibility for their supervisor's actions, there was also a reward for those who took the horrific effect of workplace sexual harassment on women seriously, and did something about it. Last, by placing a burden on employees, and presumably on their collective bargaining agents, where applicable, the *Ellerth/Faragher* affirmative defense puts a burden on the employee to capitalize on the employer' s antidiscrimination efforts. The ultimate feature of the affirmative defense is that it encourages the education of low level supervisors, and the workforce also, about the employer's plan, to be meaningful. As an alternative to strict liability, where the top brass were not individually involved or personally responsible for the supervisor' s abusive behavior, the Court, in effect said, put a good plan in place, administer and enforce it properly, and should a supervisor abrogate his responsibility, follow the plan to remedy the situation and presumably resolve and remedy the employee's injuries. Further, should it come to litigation, you'll be able to raise this defense and let the fact finder decide if the employee reacted reasonably to the availability of the antidiscrimination plan. But once more, if you fire the employee, you can't raise the defense.

Into this relatively simple circumstance came the constructive discharge. What happens when an employee is forced off the job by intolerable harassment? At this point the factual thicket becomes more complicated. A formal firing is easy. The facts are plain. A fact finder can weigh

the circumstances and make a decision as to whether the dismissal was an act of harassment or one of discrimination discrimination. But making that decision becomes fraught with subjective considerations when the employee complains that she just can't take it anymore, or that circumstances compelled her to leave in the face of unreasonable harassment. This will always be a fact specific determination. If an apocalyptic hiatal occurrence takes place which makes it clear to the unaided eye that no sensible person could deal with the harassment, then few would argue that a constructive discharge is not the legal equivalent of a formal discharge. Naturally, in cases where a plaintiff complains that they "just can't take it anymore" proving the constructive discharge may be far more difficult. However, that's what judges and juries are for. Enter stage Left, making the transition from work place facts, to a case and controversy as a matter of law, is the "tangible employment action". One of a litany of prohibitions appearing in *Ellerth* and *Faragher*, lest the employer's enjoyment of the affirmative defense be denied, a tangible employment action was defined as a "significant change in employment status," generally resulting in economic injury (*Ellerth* at 761-62, *Faragher* at 808). Included in the list was " firing". The Third Circuit reasoned in the opinion appealed from, that assuming a constructive discharge was proved, a constructive discharge being the functional equivalent of a formal discharge, that it necessarily followed that the affirmative defense would not be available to an employer for their supervisor's excesses pursuant to the "aided in agency standard" enunciated in the Restatement of Agency section 219(2)(d). Any other result, reasons the Third Circuit, is not consistent with *Ellerth/Faragher* and a host of

interrelated decisions of this Court, other circuits and district courts throughout the land. Respondent would add that equating a constructive discharge, which is, after all, an obvious euphemism for being forced through mistreatment by your supervisor, to quit against your will, with a formal firing, which is being overtly ordered by your supervisor to quit against your will, is like choosing to die by the gun or the knife. It is a Hobbesian choice, the pain's the same, and you're just as dead. So we come to a simple plain choice, namely, is a constructive discharge a "tangible employment action" like an "official act" discharge, or is it different, and if it's different what identifiable common and material characteristics separate an official act discharge from a constructive discharge such that we can fashion a rule of law around the difference which furthers the objectives of Title VII policy. There are none. The petitioner and its amicae employ a number of red herrings in their arguments in support of treating a constructive discharge differently from an official discharge in the context of the *Ellerth/Faragher* affirmative defense. Their argument is weak. The strategy is to admit the obvious i.e. that an official act discharge, because it cuts off access to the plan, denies the employer access in return to the affirmative defense. But then petitioner engages in a legal sophistry. Attempting to obfuscate a factually insignificant difference between officially dismissing an employee and forcing the employee to leave through egregious mistreatment, the petitioner attempts to focus the argument on the reasonable person standard in constructive discharge cases by saying that the employees " reaction" "does not change the nature of the supervisor's actions for purposes of agency law". Well of course it doesn't. But that's not the point. The point is what

effect the supervisors actions have on the employees option, indeed burden, to exploit the anti-discrimination plan which is one leg of the affirmative action defense. But more cogently, the supervisor' s actions for purposes of agency law, bears no relation at all to the supervisor' s egregious actions which cause an involuntary quit or a pretexual termination based on sex discrimination. A formal discharge as an act of sex discrimination, in which case the affirmative defense would be denied, is no different than a false inquisition threatening criminal charges and arrest resulting in a forced resignation. That is what we are comparing in this case, not a non- tangible employment action which does not invoke the specter of the affirmative defense because presumably the employer's plan is in effect and being used, as against a supervisor' s actions which are on the prohibited list in *Ellerth* at page 761. Petitioner makes just such an apples and oranges argument on page 20 of its brief. Petitioner argues that" in fact it is clear that harassment which leads an employee to resign is not the kind of injury which only a supervisor can cause". Of course not. Co-workers can cause this kind of injury. A high company official removed from intimate contact with the workplace can cause this kind of injury. But those are factual distinctions awaiting resolution in individual cases. As a general rule, it's not that these injuries are typically caused by supervisor's, which we know they are, which dictates the general rule itself, it's the perpetrator armed with the authority of the employer as defined by the "aided in agency standard" which is determinative. It's axiomatic that co-workers lack employer authority by definition, therefore, ostensibly, the affirmative defense would be available. So too with vendors in most cases, or with any other entity over

which the employer maintains no managerial control. These arguments are red herrings designed to focus attention on the employee's reaction, criticizing as it were, by omission, the reasonable person standard, instead of properly focusing on the supervisor's conduct and the supervisor's authority which is the mix this court identified as material to the availability of the affirmative defense not a scope of employment argument. Not fooled by these entreaties the Third Circuit concluded that a constructive discharge, if proved, is a tangible employment action within the holding of *Ellerth/Faragher* and consequently the *Ellerth/Faragher* affirmative defense is not available to the employer in such cases.

Consequently, in response, Nancy Suders would ask this court to eliminate completely the affirmative defense written into Title VII law by *Ellerth/Faragher* for the simple reason that an employer can and should take serious steps to put a command emphasis on the elimination of sexual harassment in the workplace. If employees truly did so the problem would shrink. As the evidence in this case shows the petitioner cared very little about making their program available to affected employees, or in doing anything about the horrific harassment suffered by respondent. And when the District Court looked at the facts, it interpreted the affirmative defense as an opportunity for summary judgment, leaving Nancy Suders without any remedy. Furthermore, because litigation does not, or rarely does, present plaintiffs generally with a sufficient opportunity to truly explore an employer's, always touted, commitment to their antidiscrimination plan, it is rarely possible to get before a court what the employer's performance in enforcing their plan has been generally let alone the past track record

of the supervisor's, which in counsel's experience is typically hidden or unavailable. Respondent realizes this may be beyond the simple form of the question before this court but feels duty-bound to make this request based upon her experiences and the nature of the petitioner's conduct along with that of petitioner's supervisor's.

II. A constructive discharge is a tangible employment action when it results from a hostile work environment created by a supervisor

The question in this case embodies two distinct (although interrelated) legal issues: (1) Under what circumstances is an employer liable for constructive discharge? (2) Is an employer liable for a hostile work environment if it contributes to, or culminates in a subsequent constructive discharge?

For more than three decades the lower courts have been in agreement that the constructive discharge of an employee can violate Title VII. Prior to *Faragher* and *Ellerth*, employers were generally regarded as liable for a constructive discharge precipitated by a supervisor, without regard to the particular type of discriminatory practices which had led to that resignation.[1]

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[1]That construction of Title VII remains codified in the EEOC's Interpretive Manual:

> Respondent is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party. . . . If an employee resigns because (s)he is being subject

That Title VII embodies a protection against constructive discharge is not in dispute. Petitioners apparently acknowledge that an employer would be liable for many unlawful constructive discharges, including those caused by actions such as a discriminatory demotion, transfer, denial of promotion, or reduction in pay[2]. Petitioners agree as well, and the United States insists, that an employer would be liable for harassment-based constructive discharge if the harassment that led to the employee's resignation involved to a significant degree some express use of a supervisor's official authority.[3]

Petitioners contend, however, that an employer should be able to defeat at least some[4] other claims of harassment-based constructive discharge by invoking the affirmative defense established by this Court's decisions in *Faragher* and *Ellerth*. But that affirmative defense was expressly established only for claims for "an actionable hostile work environment." *Faragher*, 514 U.S. at 807. The defense should not be extended to constructive discharge or other Title VII claims.

> to racial harassment and the resignation is directly related to that harassment, the Commission will view the resignation as a constructive discharge.

Section 612.9(a).

[2]All of these discriminatory acts would necessarily involve a use of a supervisor's official power.

[3]Pet. Br. 20-24.

[4]Petitioners correctly note that an employer would be liable for harassment that involved any acts by a supervisor for which an employer would be liable under any other agency principles (e.g actions within the scope of the supervisor's employment). (Pet. Br. 20 n. 14).

For 30 years the lower courts have been resolving cases under federal anti-discrimination laws in which an employee asserted that he or she was constructively discharged. Those courts have been essentially unanimous in agreeing that a constructive discharge can violate Title VII or other federal employment laws, and the EEOC has long endorsed that view. There remain some differences among the lower courts about the standard that must be met to establish an unlawful constructive discharge.

The past decisions of this Court have not undertaken to determine the essential elements of a Title VII constructive discharge case. The instant case does not necessarily require the Court to resolve the substantive elements of a constructive discharge claim, but an evaluation of whether an employer would be liable for a constructive discharge does require an understanding of the distinct types of circumstances in which such claims arise.

The phrase "constructive discharge" has its roots in early decisions under the National Labor Relations Act, after which Title VII was modeled. In the context of disputed union organizing campaigns, employers at times sought to dismiss union activists and sympathizers, both to remove workers who openly favored a particular union, and to deter other employees from doing so. The NLRA expressly forbids the dismissal of an employee because he or she had engaged in protected pro-union activity. In an effort to evade that prohibition, supervisors frequently used harassment and other adverse actions for the purpose of pressuring union sympathizers to resign.

The National Labor Relations Board sensibly concluded that the statutory prohibition against retaliatory discharges could not be evaded in this manner. The Board

came to describe workers removed in this manner as having been "constructively discharged", a phrase which emphasized that the supervisor's actions were in substance, although not in form, a discharge. As the NLRB explained in a 1964 decision, a "resignation," under pressure and scare . . . is treated for legal purposes the same as an actual discharge, although it is sometimes referred to as a 'constructive discharge.'" *The Coachman's Inn,* 147 NLRB 278, 304 (1964). By the time that Title VII was modeled after the NLRA and enacted, the NLRB's constructive discharge doctrine was well established. The Board summarized those decisions in *Crystal Princeton Ref. Co.,* 222 NLRB 1068 (1976):

> "There are two elements which must be proven to establish a constructive discharge. First, the burden imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities."

222 NLRB at 1069.

From the outset constructive discharge claims under Title VII have fallen into two distinct categories.[5] In some instances, as occurred under the NLRA, a supervisor acted with the intent of inducing the resignation of a worker whom

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[5] *Jackson v. Arkansas Dept. of Education*, 272 F. 3d 1020, 1026 (8th Cir. 2002)("to be liable, the employer must have intended to force the employee to quit, or at least have reasonably forseen the employee's resignation as a consequence of the unlawful working conditions it created.")

the supervisor wanted to get rid of. For example, a supervisor who wanted to dismiss an employee for having filed a Title VII charge, or having engaged in other activities protected by section 704, might attempt to achieve the same result through creating oppressive working conditions.[6] Or a supervisor might declare his intent to fire a worker, with the intent of inducing the employee to quit before she was discharged.[7]

The EEOC, and the lower courts, have held that an employer could be liable for a resignation forseeably induced by unlawful discriminatory practices just as the employer would be liable for the dismissal of the employee. In this category of cases liability was imposed, not because a supervisor had deliberately sought to induce a resignation, but because the resignation was a foreseeable result of

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[6]E.g., EEOC Decision 70-683 (1970)(after charging party filed a complaint with the Colorado Civil Rights Commission, plant guards kept him under constant surveillance "intended to force Charging Party to resign"; "[a]ccordingly, the Commission concludes that Charging Party was constructively discharged.").

[7] EEOC Decision 71-1413 (1971)(charging party resigned after she became pregnant in fact of policy of her airline employer of dismissing female flight hostesses who were pregnant; charging party "thus was constructively discharged."); EEOC Decision 71-1545 (1971)(supervisor told charging party he wanted her to stay on the job only if she "stopped 'pestering for equal rights'"; "by leading Charging Party to believe that she had either to forgo her protected rights to oppose discrimination or forgo her employment, Respondent constructively discharged her.")

discriminatory acts or conditions.[8] In attempting to ascertain whether a resignation was foreseeable, the courts have often

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[8]EEOC Decision No. 72-2062 (1972)(African-American workers confined to poorly paid department with no possibility of promotion to better-paid all-white jobs. Charging party resigned after concluding there was no possibility of any promotion. "Thus Charging Party's resignation was directly related to Respondent's unlawful employment practices, and we conclude that in circumstances such as the ones presented by the instant case, the resignation was a foreseeable consequence of those unlawful practices and constitutes a constructive discharge.")(emphasis added); EEOC Decision No. 72-0779 (1971)(charging party was denied promotion because of race, called a "nigger" by a supervisor, and then reprimanded for a non-existent transgression because of his race; "We find that the resignation was a foreseeable effect of the racially discriminatory reprimand and, as such, amounted to a constructive discharge because of race."); EEOC Decision No. 72-1114 (1972)(charging party's supervisor attempted to convert him to a particular religion, and charging party believed his job security was imperiled by his rejection of those efforts; "the resignation of [the] Charging Party . . . constitutes a constructive discharge because of the unlawful factors precipitating his actions."); EEOC Decision No. 72-0661 (1971)(charging party who contacted the NAACP about a layoff was admonished by her supervisor that her actions would "stir up trouble" and would "hurt" her; "we infer that she quit because of the words uttered by her supervisor . . . . We conclude that Charging Party was thus constructively discharged."); EEOC Compliance Manual, § 612.9(a)("If the resignation is directly related to the respondent's unlawful

inquired whether a reasonable person would have resigned under similar circumstances. That is a sensible inquiry, because it would not ordinarily be foreseeable that a the victim of discrimination would respond in an unreasonable manner.

The EEOC and lower courts often characterized such foreseeable resignations as "constructive discharges." This was an understandable but semantically strained extension of the same phrase used in NLRA cases, because the rationale for imposing liability in this second category of cases has nothing to do with any scheme to discharge the worker. The imposition of liability in these cases is consistent with the general practice of imposing liability for the foreseeable consequences of any unlawful discrimination. For example, where an employer's overt practice of promoting only whites deters minority workers from even seeking a traditionally all-white job, those deterred workers receive the same relief as rejected applicants. *Teamsters v. United States*, (citations omitted) Such deterred workers are not characterized as having been "constructively denied promotions"; the phrase "constructive discharge," however, continues to be used to describe foreseeable discrimination-induced resignations.

The use of the single phrase "constructive discharge" to describe what are in reality two distinct theories of liability has bred a significant degree of confusion among the lower courts. Some decisions have recognized only a single hybrid theory of liability, requiring a plaintiff to prove both that the supervisor intended to induce a resignation (the touchstone of the first type of constructive discharge cases) and that the resignation was reasonable or foreseeable (the touchstone of the second

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employment practices, it is a foreseeable consequence of those practices and constitutes a constructive discharge.")

type of constructive discharge cases). Other decisions have fashioned a different type of hybrid, in which the foreseeability of a resignation is deemed sufficient to demonstrate an intent to coerce a resignation. There are, without doubt, instances in which both foreseeability and intent are present. But a sound analysis of the issues in this case is facilitated by a recognition that the phrase "constructive discharge" can refer to either of two distinct types of problem and theories of liability.

(1) Harassment By A Supervisor Is "Aided By The Existence of The Agency Relation"

This Court held in *Faragher* and *Ellerth* that an employer's liability for workplace discrimination must generally be based on agency principles. An employer is liable for the discriminatory acts of a supervisor if the supervisor, in committing those acts, was "aided by the existence of the agency relation", *Faragher*, 524 U.S. at 801 (quoting Restatement (Second) of Agency, § 219(2)(d)), such as actions involving use of a supervisor's position and authority. This Court expressly recognized that even sexual harassment by a supervisor ordinarily involves at least an implicit use of official authority.

> "Several courts, indeed, have noted . . . that there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship. . . . [T]he victim may well be reluctant to accept the risks of blowing the whistle on a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an

> employee cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise--[which may be] to hire and fire, and to set work schedules and pay rates--does not disappear . . . when he chooses to harass through insults and offensive gestures . . . ." Supervisors do not make speeches threatening sanctions . . . and yet every subordinate employee knows that sanctions exist."

Faragher, 524 U.S. at 805. "[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ellerth*, 524 U.S. at 763.

That implicit use of supervisory authority is of even greater importance in constructive discharge cases. Most harassment does not result in the resignation of the victim. Harassment victims are likely to resign only where the harassment is particularly serious or protracted, or where the victim can avoid discharge or other discriminatory reprisals only by submitting to sexual demands. As a practical matter, it is far more probable that a supervisor, rather than a co-worker, would engage in the type of harassment that would lead a victim to resign.

Decisions in the lower courts reflect just this distinction. In harassment cases in which the lower courts have considered whether a constructive discharge constitutes a tangible employment action, the harasser was almost

invariably a supervisor. We have identified 18 such decisions in the courts of appeals. In all of those cases the harassers included a supervisor, and in 16 of those instances of asserted constructive discharge all of the harassers were supervisors.

Often the more serious the harassment, the greater the likelihood that the victim will complain, that the employer will take the complaint seriously, and that the perpetrator will be disciplined. But the increased risk of discipline that is likely to deter a fellow worker from more serious harassment may not exist where the harasser is a supervisor. Supervisors may believe, at times with good reason, that their managerial status will enable them to engage in egregious forms of harassment without being dismissed or otherwise disciplined. A supervisor may correctly understand that he (unlike a peer harasser) is more important to the employer than a subordinate victim, and that the employer may thus be inclined to discredit allegations by that subordinate. The supervisor (unlike a peer harasser) frequently will outrank in authority, stature and compensation the personnel official responsible for investigating a harassment charge. Under those circumstances the supervisor may be protected by his agency position from discipline for engaging in the type of serious harassment that a peer harasser could not expect to get away with.

(2) The Affirmative Defense Established by Faragher and Ellerth Should Be Narrowly Construed

Despite the fact that sexual harassment by a supervisor is ordinarily aided by the perpetrator's official position, the affirmative defense recognized by *Faragher* and *Ellerth* may permit an employer to avoid liability for a hostile work environment created by the misuse of that authority. The

EEOC has correctly noted that "[h]arassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly."[9]

Faragher and *Ellerth* held only that the affirmative defense they recognized could be invoked to defeat "vicarious liability . . . for an actionable hostile environment created by a supervisor." *Faragher, 524 U.S. at 807; Ellerth,* 514 U.S. at 765. Neither decision purported to determine whether that defense should be extended as well to constructive discharge claims related in some way to earlier harassment. The reasoning of *Faragher* and *Ellerth* does not require or support such an extension of the affirmative defense.

Several important considerations support a narrow construction of the scope and reach of the *Faragher/Ellerth* affirmative defense. First, that defense--although warranted by the considerations noted on those cases--does represent a departure from normal agency principles. If the affirmative defense does apply to a harassment-based constructive discharge claim, a plaintiff would not be able to rely on any implicit use of authority, but would have to show that the perpetrator expressly invoked or exercised official authority. Second, any expansion of the applicability of the affirmative defense will shorten the deadline by which an aggrieved employee must bring discrimination to the attention of the employer, a result that would be at odds with the express decision of Congress to afford employees 180 (or 300) days to do so. Third, application of the affirmative defense to a harassment-based constructive discharge would have the

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[9]EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, part V B.

paradoxical consequence--not present in a simple hostile environment case--that the deadline for complaining about the events that caused the constructive discharge could and frequently would expire before the constructive discharge itself had occurred.[10] (13)

(3) The Reasoning of Faragher and Ellerth Does Not Warrant Extending the Affirmative Defense Established By Those Decisions to Constructive Discharge Cases

Faragher and *Ellerth* frankly recognized that supervisor harassment was aided by the existence of the agency relationship. The Court nonetheless declined to impose, in hostile work environment cases to the same liability that would ordinarily be required by agency principles. The special *Faragher/Ellerth* affirmative defense was adopted for reasons specific to ordinary hostile environment claims, and should not be extended to other types of Title VII violations.

This Court reasoned, first, that the omnipresent implicit use of supervisory authority in a harassment case could not be treated as sufficient to impose liability for a hostile work environment, because it would result in automatic liability in all cases of supervisory harassment. *Faragher,* 524 U.S. at 804. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, --- (1986), had expressly rejected any such automatic liability.

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[10]In the instant case, Suders resigned on August 20, 1988, and filed her Title VII charge (with resulting notice to the employer) in September, 1998. It evidently is petitioner's contention that Suders should have complained (by means of an internal procedure or a Title VII charge) prior to August 20.

The imposition of liability for harassment-based constructive discharges poses no such problem, because it would reach only particularly serious types of harassment. Most cases of harassment--those not resulting in a constructive discharge--would continue to be subject to the affirmative defense.

Second, *Faragher* and *Ellerth* recognized that employers would be more likely to take steps to prevent harassment if the law provided employers with "some . . . incentive" to do so. *Faragher,* 524 at 806; see *Ellerth,* 524 U.S. at 764 (employers would be more likely to take preventative measures if it might affect their liability for harassment.) That purpose is adequately advanced by affording the *Faragher/Ellerth* defense in the more routine harassment cases which do not culminate in a constructive discharge. It is inconceivable that an employer would opt not to create an effective anti-harassment policy, and thus to forgo that defense in <u>all</u> harassment cases, merely because the defense would not extend to the less common cases involving constructive discharges. In the six years since *Faragher* and *Ellerth,* employers had no guarantee that the affirmative defense would extend to constructive discharge cases; no party suggests that that possible limitation has impaired the interest of employers in adopting anti-harassment policies.[11]

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[11]For several years the Eighth Circuit has held that employers are liable, not only for a harassment-based constructive discharge, but for the harassment that preceded it. *Jackson v. Arkansas Dept. of Education,* 272 F. 3d 1020, 1026 (2001). The opposite rule has been followed in the Second Circuit. *Caridad v. Metro-North Commuter Railroad,* 191 F. 3d 283, 294-95 (2d Cir. 1999). No party suggests that this has led to any difference in the willingness of employers in these

The affirmative defense was also fashioned to "encourage employees to report harassing behavior before it becomes severe or pervasive." *Ellerth,* 524 U.S. at 764. The application of that defense to ordinary harassment claims is sufficient to achieve that purpose. A harassment victim otherwise willing to complain about that abuse assuredly would not instead decide to refrain from complaining about sexual harassment in the expectation that the harassment would in time become so egregious or protracted as to trigger a constructive discharge. If a victim feared that harassment would escalate, or continue unabated to the point of a constructive discharge, that fear would provide an important additional incentive to complain. There is no need to go further and threaten the victim with forfeiture of any future constructive discharge claim if she fails to report the abuse.

Petitioner asserts that if the affirmative defense does not apply to constructive discharge claims, it will prompt sexual harassment victims to "<u>hoar[d]</u> . . . their grievances, rather than attempting to resolve them." (Pet. Br. 22)(Emphasis added). That is like suggesting that victims of domestic violence "hoard" their bruises until they have enough to assure their abuser will be convicted of a felony rather than a misdemeanor. To suggest that a victim would deliberately endure a hostile work environment, in the hope that it would get so bad as to force her to resign, is to ignore the often excruciating emotional and psychological harm caused by sexual harassment.

Faragher and *Ellerth* rest in part on the general principle that a discrimination victim must take reasonable steps to avoid or mitigate harm. *Faragher*, 524 U.S. at 806;

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two circuits to adopt anti-harassment plans.

Ellerth, 524 U.S. at 764. But when the victim of sexual harassment is driven to resign, that is often because she or he has concluded that the emotional and psychological harm that would be suffered by remaining on the job (even while awaiting the result of a harassment complaint) outweighs the wages that would be earned. A sexual harassment victim often could reasonably conclude that it would be more prudent to bring the harassment to an immediate and certain end, while running the risk of some delay in finding a new job. Staying on the job and complaining, while retaining the benefits of current employment, means enduring at least some (perhaps considerable) additional harassment while running the risk that a complaint will result in exacerbated harassment (e.g. because the harasser sees that the complaint process failed), retaliation, or dismissal. The statutory cap on compensatory damages under Title VII will at times mean that a harassment victim who has already endured serious harassment will be unable to obtain any additional monetary relief for whatever further harassment she may endure if she remains on the job. Resignation under such circumstances is by its very nature a step to mitigate the harm being suffered. A finding of constructive discharge often will rest on the conclusion by the trier of fact that the victim acted reasonably in mitigating her damages in that manner. *Faragher* and *Ellerth* surely do not mean that a harassment victim must be denied recompense for the incidental costs (back pay) of one form of mitigation (resignation) because she failed also to use some other form of mitigation (an internal complaint).

(4) Extension of the *Faragher/Ellerth* Affirmative Defense to Constructive Discharge Claims Would Raise Intractable Practical Problems

The affirmative defense was also crafted to avoid difficult problems of judicial administration. *Faragher*, 524 U.S. at 807. Extending that defense to constructive discharge claims would create often intractable litigation difficulties. As this case well illustrates, constructive discharges frequently involve a complex mix of supervisory discriminatory actions and motives. The *Faragher/Ellerth* defense could apply, at most, only to some of those violations. Assessing liability in such a situation would involve unraveling a tangled skein of factual disputes, legal issues, and confusing jury instructions.

First, petitioners and the United States repeatedly acknowledge that the affirmative defense would not apply to an express use of company authority. The instant case involves several such actions. On July 22, 1998, Suders received a supervisor's notation for allegedly failing to complete an earlier assignment. On July 26, 1998, she was reprimanded for supposedly having failed to disseminate certain information. Corporal Baker reprimanded Suders for allegedly having taken home a missing file. Suders contended that these exaggerated disciplinary measures were taken against her because of her gender. All of these actions could only have been taken by a supervisor. The events which caused Suders' ultimate resignation were caused solely by her supervisors and their abuse of authority. See Pet. App. 27a " Any shred of doubt, however, is removed when considering the events of Suders' final day on the job...." Sergeant Easton directed a subordinate to dust with the special detection powder (App. 27), directed the corporals to monitor the results (App. 47), and then used his supervisory authority to summon Suders and demanded that she explain her possession of her own test results all the while indicating she was being arrested and was going to be charged criminally. The United States suggests that the use

of such supervisory powers would bar the *Faragher/Ellerth* defense if they constituted a "significant" part of the events leading to the constructive discharge. The government does not explain whether "significance" is to be assessed in light of the portion of the incidents that involved the use of such supervisory power, or the comparative importance of those incidents. Implementation of this distinction would require a complex set of jury instructions, under which the jury would have to determine (a) which incidents involving supervisory power had actually occurred, (b) which of them involved an unlawful motive, (c) which discriminatory incidents not involving use of supervisory power had occurred, and (d) the comparative significance (however defined) of each.

Second, the *Faragher/Ellerth* defense does not apply to actions which were in the scope of the supervisor's employment. If the supervisors were harassing Suders because they objected to a woman holding her job, or found it particularly objectionable that a woman had obtained her position through political connections, that would of course violate Title VII. Frequently harassment of a sexual nature is engaged in for purely personal reasons. But some of the harassment alleged in the instant case was not sexual. The existence of this non-sexual harassment, in turn, raises questions about whether the supervisors engaged in the harassment that was of a sexual nature, not because it provided them with any sexual gratification, but because sexual harassment was an especially noxious way to abuse a female employee to whom they had gender-based objections. All of those issues would have to be sorted out at trial, and weighed by the jury together with other actions to which the *Faragher-Ellerth* defense could not apply.

Third, the affirmative defense requires that an employer establish an effective anti-harassment policy, and that the employer exercise reasonable care to prevent and correct discriminatory harassment. The obligation to correct such harassment is not limited to instances in which the victim files a complaint through the employer's internal complaint mechanisms. To be entitled to the defense, the employer must also exercise reasonable care to address allegations of harassment which it receives from other sources, including from a charge filed with the EEOC, and served by the EEOC on the employer.

The EEOC and the lower courts have recognized that an employer's receipt of a Title VII charge (or similar charge under state law) triggers the employer's obligation under *Faragher* and *Ellerth* to correct unlawful harassment. "[I]f an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process."[12] Where investigation of such a Title VII charge reveals unlawful harassment, the EEOC has insisted that the corrective action under *Faragher* and *Ellerth* should include, where warranted, both reinstatement and "correction of any other harm caused by the harassment (e.g., compensation for losses.)"[13] The obligation to take corrective action does not end merely because the discriminatory conduct forced a charging party to give up her job. He other member See *Robinson v. Shell Oil Co.*, (citations omitted) former employee still an employee within the meaning of Title VII).

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[12]EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, part V C 2.

[13]Id. at V, C, 2.

A Title VII action seeking redress for a constructive discharge cannot be brought unless that plaintiff has first filed with the EEOC (or a state or local EEO agency), and the Commission has in turn provided to the employer, an administrative charge alleging that the plaintiff was the victim of a constructive discharge. That charge, and the resulting EEOC investigation and conciliation, will invariably provide the employer with specific allegations that the charging party was driven from her job by harassment or other abuse. (In the instant case petitioners received written information about the alleged harassment within a few weeks of the constructive discharge.[14]) A *Faragher/Ellerth* defense to a constructive discharge claim could not be sustained without a determination as to whether an employer exercised reasonable care in investigating the allegations of that EEOC charge, and in redressing any identified discrimination.[15]

Fourth, any affirmative defense would necessarily be limited to cases in which the employer's reasonable care, and the employee's unreasonable failure to utilize opportunities provided by the employer, both related to the particular harassment which is the basis of the constructive discharge claim. If a case involves two (or more) sufficiently distinct types of harassment (or perhaps different harassers), the availability of the affirmative defense may have to be assessed separately for each type of harassment. All forms of sexual

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[14]Suders resigned on August 20 , 1998. Within a week she had scheduled an EEOC intake. She filed her Title VII charge on September 18th, 1998. The applicable EEOC regulations required that that charge be provided to petitioners within 180 days.

harassment by a single supervisor would, at least ordinarily, be assessed together. On the other hand, if an employee had acted reasonably in not complaining about one type of harassment (e.g. racial harassment), but had been unreasonable in not complaining about another form of harassment (e.g. sexual harassment), the affirmative defense would apply only to the latter.

Fourth, it would assuredly be inappropriate to permit assertion of the *Faragher/Ellerth* affirmative defense in a case in which a supervisor had harassed (and perhaps otherwise discriminated against the plaintiff) for the purpose of forcing the employee to resign. *Faragher* and *Ellerth* made clear that the affirmative defense would not be available if the harassment "culminates in a . . . discharge." *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765. Where a supervisor, rather than openly dismissing an employee, successfully sets out to achieve the same result by forcing the worker to resign, that action should be treated--as it is under the NLRA--as a dismissal. Any other rule would inevitably invite evasion of the holding in *Faragher* and *Ellerth* that a dismissal precludes assertion of the affirmative defense.

Whether an employer is liable for the injuries caused by a pre-constructive discharge hostile work environment presents a distinct legal issue.

Since this Court's decisions in *Faragher* and *Ellerth*, the lower courts have come to differing conclusions about an employer's liability in such circumstances. The lower courts have felt compelled to resolve this question by attempting to determine whether a constructive discharge is a "tangible employment action" within the meaning of *Faragher* and

Ellerth. The EEOC has in the past maintained that a constructive discharge does constitute a tangible employment action.[16] Petitioners argue for a definition of "tangible employment action" that would exclude constructive discharges.

These arguments, like the analyses in some lower court decisions, have sought to find in *Faragher* and *Ellerth* the answer to a question which simply was not before, and was not decided by, the Court. Precisely because the Court had no occasion to consider the particular significance of a constructive discharge, those decisions contain language that supports conflicting conclusions. *Ellerth*, for example, describes a "tangible employment action" as something that "constitutes a significant change in employment status." 524 U.S. at 761. A constructive discharge certainly fits within that description. Elsewhere, on the other hand, *Ellerth* refers, not to a tangible employment action, but a tangible employment decision, and states that such a decision "requires an official act of the enterprise." 524 U.S. at 762. That formulation is more difficult to apply to a constructive discharge.

Ellerth notes that a tangible employment action "in most cases is documented in official company records, and may be subject to review by higher level supervisors." Id.. An employee's resignation, whether or not the result of a

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[16]Plaintiff EEOC's and Plaintiff-Intervenors' Trial Brief, EEOC v. Crowder Construction Co., Civil Action No. 3:00CV186-V for (W.D.N.C.) p. 3 ("Constructive discharge constitutes a tangible job action because it results in a 'significant change in employment status.' *Ellerth*, 524 U.S. at 761.")

constructive discharge, will almost invariably be reflected in company records. It is subject to review in at least one sense: companies often conduct exit interviews, or make some other form of inquiry, to learn whether a resignation is the result of some employment problem. On the other hand, a constructive discharge is not subject to "review" in the sense that a decision to fire or demote could be appealed to and reversed by higher officials.

Ellerth also observes that "[a]s a general proposition, only a supervisor, or other person acting with the authority of the company" can cause the "direct economic harm" of a tangible employment action. 514 U.S. at 762. Constructive discharge, unlike, for example, emotional distress caused by unwanted sexual touching, does cause a direct economic harm.[17] As we explained supra, in practice, harassment or other discrimination, serious enough to result in a constructive discharge, is usually the result of actions by supervisors, not by peers.

The characterizations of a tangible employment action in *Ellerth* fairly support the conclusion that a constructive discharge should be treated as such an action. There is, however, a more straightforward and compelling basis for resolving this issue. In referring to (and to some degree defining) a tangible employment action, the purpose of this

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[17]See *Ellerth*, 524 U.S. at 760:

> If the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing.

(Quoting *Sauers v. Salt Lake County*, 1 F. 3d 1122, 1127 (10th Cir. 1993).

Court's decisions in *Faragher* and *Ellerth* was to delineate the supervisory actions for which an employer would indeed be liable. *Ellerth* 514 U.S. at 760. For the reasons noted above, a constructive discharge brought about by the discriminatory actions of a supervisor, whether or not those actions involve harassment, is a claim for which employers are necessarily liable. Where an employer is liable for the culmination of a supervisor's discriminatory practices, it is entirely appropriate for that liability to encompass as well any earlier harms caused by some or all of the discriminatory actions involved.

CONCLUSION

This Court is respectfully requested to hold that a constructive discharge, if proven constitutes as tangible employment action within the law of *Ellerth/Faragher*.

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No. 03-95

IN THE
Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner

v.

NANCY DREW SUDERS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

I. An Employer Should Be Allowed To Assert The Affirmative Defense When A Supervisor Creates A Hostile Work Environment Which Culminates In A Constructive Discharge.

A. As respondent concedes, an employee's claim of constructive discharge has no effect on whether a supervisor's creation of a hostile environment satisfies the aided-by-the-agency-relation standard.

This case presents a question of vicarious liability, the resolution of which, as the Court has repeatedly held, depends upon principles of agency law — in particular, the principle that an employer is liable for its agent's torts when the accomplishment of those torts was aided by the existence of the agency relationship. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754-760 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 801 (1998); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). In *Ellerth*, the Court held that an employer is strictly liable for a supervisor's "tangible employment actions" — hirings, firings, promotions, and so forth — because it is "beyond question," *id.*, at 761, that such actions satisfy the aided-by-the-agency-relation standard. *Id.*, at 761-763. The Court also made it clear, however, that strict liability is not appropriate for acts of harassment creating a hostile work environment, because (among other reasons) such acts do *not* clearly satisfy this standard. *Ellerth*, 524 U.S. at 763.

As we explained in our opening brief, this agency analysis of a supervisor's actions is not affected by a claim of constructive discharge. *See* Br. for Pet. 18-22.

Actions that would not otherwise satisfy the aided-by-the-agency-relation standard, are not converted into acts of agency just because an employee resigns in response to them. The agency question turns on the relationship *between the supervisor and the employer*, and actions of the employee are simply extraneous to that relationship. Thus, if a supervisor's creation of a hostile work environment does not clearly satisfy the aided-by-the-agency-relation standard — and as the Court explained in *Ellerth*, it does not — then this remains true whether or not that environment causes an employee to resign.

Respondent and her *amici* do not contest this central point; indeed, respondent explicitly concedes it. Br. for Resp. 21 ("petitioner [says] that the employees [sic] 'reaction' 'does not change the nature of the supervisor's actions for purposes of agency law.' Well of course it doesn't.") But apart from this concession, respondent and her *amici* virtually ignore the agency analysis which lies at the heart of *Ellerth* and *Faragher*, and which controls this case as well.

Instead, respondent and her *amici*, like the Court of Appeals, rely almost entirely on the idea that, because a constructive discharge is treated as the "functional equivalent" or the "legal equivalent" of an actual discharge in other contexts, it should be treated so here as well. *See* Br. for Resp. 10-11; Br. for Lawyers' Committee for Civil Rights under Law *et al.* as Amicus Curiae 11-17; Br. for AFL-CIO as Amicus Curiae 8-9; Pet. App. 50a. But while constructive discharges and actual discharges may resemble each other in some ways — particularly in their economic effect on employees — the two are not identical in all respects; and the ways in which they differ are precisely those which are most relevant to agency analysis. *See* Br. for Chamber of Commerce as Amicus

Curiae 12-13; Br. for Soc. for Human Resource Management as Amicus Curiae 20-21. First, a constructive discharge caused by a hostile environment is not an "act" of the employer at all, still less is it an "official act" which invokes the employer's authority; rather, it is an employee resignation which, however reasonable, is neither ratified nor approved by the employer. Second, the hostile environment which precipitates such a resignation can be created by co-workers as well as by supervisors, and the creation of such an environment thus by definition cannot be an action which falls within the "special province of the supervisor ... as a distinct class of agent." *Ellerth*, 524 U.S. at 762. For purposes of the agency principles that underlie Title VII, then, a constructive discharge is quite different from an actual discharge.

B. Denying the affirmative defense in constructive discharge cases will create more problems than it will solve.

Amici on both sides have suggested that, because the *Ellerth/Faragher* affirmative defense overlaps with the defense of a constructive discharge on the merits, the affirmative defense may have little practical significance in such cases. *See* Br. for Equal Opportunity Advisory Council as Amicus Curiae 12-15; Br. for Lawyers' Committee for Civil Rights under Law *et al.* as Amicus Curiae 17-20. This, however, overstates the case: while the *Ellerth/Faragher* affirmative defense may sometimes duplicate the outcome of the merits inquiry, that is not necessarily or invariably so.

For example, most courts, in evaluating a constructive discharge claim, consider whether the employee, before resigning, attempted to resolve the

problem by using the employer's internal complaint or grievance procedures; and this, of course, closely resembles one element of the *Ellerth/Faragher* affirmative defense. But as the Court of Appeals made clear in this case, such evidence need not always be considered; indeed, the Court of Appeals actively discouraged district courts from admitting it as a matter of course:

> [District] courts should carefully weigh the relevance of evidence relating to an employer's antiharassment program.... In [some] cases, *some* evidence regarding an employer's antiharassment program or an employee's response to the alleged harassment *may* be admissible for the limited purpose of determining whether a constructive discharge has occurred. ...[W]e rely on the wisdom and expertise of trial judges to exercise their gatekeeping authority when assessing whether *all, some, or none* of the evidence relating to employers' antiharassment programs and to employees' exploration of alternative avenues warrants introduction at trial.

Pet. App. 60a-61a (emphases added).

Even when they consider such evidence on the issue of a constructive discharge, courts do not always give it the same significance it would have in the context of the affirmative defense. For purposes of the affirmative defense, proof that the employee "unreasonabl[y] fail[ed] to use any complaint procedure provided by the employer" is ordinarily dispositive; such proof "will normally suffice to satisfy the employer's burden." *Ellerth*, 524 U.S. at 765. But in the constructive discharge context, that same proof may be regarded as simply one piece of evidence among others bearing on the issue of whether the

employee's working conditions were truly intolerable; its significance is merely "evidentiary." *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998) As the court said in *Lindale*, "[an employee's] failure to [complain] *may* be compelling evidence that he ... would not actually have found conditions ... unbearable," *ibid* (emphasis added), but then again it may not. *See Swiech v. Gottlieb Memorial Hosp.*, 2000 WL 343244, *4 (N.D. Ill. 2000) (applying *Lindale* to hold that evidence of failure to complain does not preclude claim, but must be weighed by jury).

Such considerations no doubt explain why none of the many courts of appeals which have considered the issue presented by this case have regarded it as meaningless — an oversight which would be remarkable if it were really true that proof of a constructive discharge, and proof of the *Ellerth/Faragher* affirmative defense, are always and necessarily "mutually exclusive." Br. for Lawyers' Committee for Civil Rights under Law *et al.* as Amicus Curiae 18. *Cf.* Pet. App. 4a (case presents issues "of critical importance to civil actions brought pursuant to Title VII"). But that is not true. At most, the affirmative defense may be superfluous in some cases of constructive discharge, and the Court will therefore do no doctrinal or practical harm by adopting the rule we have submitted.

A holding affirming the Court of Appeals, on the other hand, would create serious problems on both the theoretical and practical levels. Such a holding would mean that the identical actions by a supervisor either will, or will not, be regarded as having been aided by the agency relationship with the employer, depending entirely on whether an employee regards them as so intolerable as to justify resignation, and on whether a jury later agrees with that assessment — a

result which is impossible to square with principles of agency law in any coherent fashion. It would also mean that, in most cases, the availability of the affirmative defense will not be known until a jury resolves the matter, thus increasing the uncertainty, difficulty and cost of litigation. *See* Br. for Pet. 25. And last but certainly not least, such a holding would undermine the efforts of employers to prevent and correct sexual harassment, *see* Br. for Equal Opportunity Advisory Council as Amicus Curiae 21-22; and thus in turn undermine Title VII's "primary objective ... to avoid harm." *Faragher*, 524 U.S. at 806 (internal quotation marks omitted).

C. Respondent has offered no sound reason to overrule *Ellerth* and *Faragher*.

Finally, respondent invites the Court to overrule *Ellerth* and *Faragher* "to eliminate completely the affirmative defense." Br. for Resp. 23. Respondent's request — that the Court abandon the idea that employer liability is both limited and guided by principles of agency law, in favor of a rule of unlimited vicarious liability — would of course require that the Court overrule not only *Ellerth* and *Faragher*, but *Meritor* as well. *See id.*, 477 U.S. at 72 (Congress intended to place "some limits" on employer liability for supervisors' acts, and intended the courts "to look to agency principles for guidance"). Respondent, however, offers no sound reason for doing so.

First, considerations of *stare decisis* weigh heavily against respondent's suggestion. The rule established in *Meritor*, and elaborated upon in *Ellerth* and *Faragher*, is one of "statutory interpretation pursuant to congressional direction," *Ellerth*, 524 U.S. at 755, and in such cases the command of *stare decisis* is especially strong. *E.g.*, *Patterson v. McLean Credit*

Union, 491 U.S. 164, 172-173 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for ... Congress remains free to alter what we have done"). And as the Court has already remarked, in *Meritor's* case "the force of precedent is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding." *Faragher*, 524 U.S. at 792; *accord Ellerth*, 524 U.S. at 763-764 ("Congress has not altered *Meritor's* holding even though it has made significant amendments to Title VII in the interim"). Respondent, however, simply ignores the role of *stare decisis*.

Second, respondent's request would lack merit even as an original matter. As the Court has pointed out, *Meritor's* invocation of agency principles is rooted in the text of Title VII itself, *see Faragher*, 524 U.S. at 791; *Ellerth*, 524 U.S. at 754, and respondent does not even attempt to argue otherwise. *See* Brief for Resp. 23-24. Rather, her argument is policy-based: she argues that if employees could more easily win lawsuits, "the problem [of sexual harassment in the workplace] would shrink." Brief for Resp. 23. But this is at bottom just an attempt to alter the balance which Congress struck in Title VII — an attempt which the Court has already rejected:

> The decision of Congress to leave *Meritor* intact is conspicuous. We thus have to assume that ... Congress relied on our statements in *Meritor* about the limits of employer liability. To disregard those statements now (even if we were convinced of reasons for doing so) would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment about the proper allocation of the costs of harassment for Congress's considered decision on the subject.

Faragher, 524 U.S. at 804 n. 4. The Court should therefore decline respondent's invitation.

II. None Of The Actions Allegedly Taken Against Respondent Was A Tangible Employment Action.

Respondent, and to a lesser extent the United States, suggest that respondent may have been subjected to tangible employment actions quite apart from the existence of a constructive discharge. The United States points to the actions of respondent's supervisors in "allegedly setting her up on a false charge of theft and engineering her arrest," and respondent adds to this three instances of minor disciplinary actions.[1] *See* Br. for United States as Amicus Curiae 28; Br. for Resp. 39. Even if these suggestions did not come too late, *see* Br. for Pet. 26-27, they would lack merit.

Whether or not the acts in question are what the United States calls "official acts," they would still not be "tangible employment actions" within the meaning of *Ellerth* and *Faragher*. The existence of an "official act of the company, a company act," *Ellerth*, 524 U.S. at 762, is a necessary but not a sufficient condition for a "tangible employment action"; otherwise, the term would encompass every routine use of supervisory authority to direct the day-to-day activities of employees. A "tangible employment action," however, is not merely an "official act," but an "official act" which effects "a significant change in employment status," typically accompanied by "direct economic harm." *Ibid.* Neither respondent nor the United States

[1] Respondent's brief does not supply any record citations for these incidents, but they appear to be those reflected at J.A. 88-90, 111 and 112-113 (Suders Dep.).

makes any claim that any of the incidents in question either changed respondent's employment status or inflicted any economic harm (except insofar as they contributed to her constructive discharge), nor is there any support in the record for such an assertion. There is therefore no need for a remand on this issue.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF AMICUS CURIAE OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

human resource management. Founded in 1948, SHRM's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. Through its activities, SHRM's goal is to help human resource professionals become competent and effective in managing what SHRM recognizes to be the backbone of all organizations—employees. SHRM is committed to advancing the human resources profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy. To that end, SHRM provides education and information services, conferences and seminars, government and media representation, on-line services and publication to more than 175,000 professional and student members worldwide.

As the leading association of the human resources profession, SHRM and its members are vitally concerned with the orderly development of the law defining the meaning of non-discrimination and equal employment opportunity. More specifically, SHRM and its members are concerned with the nature and scope of an employer's obligation to provide a workplace free from unlawful harassment and discrimination. SHRM affirmatively supports and encourages compliance with the fundamental principles of equal employment opportunity and strives to provide its members with the knowledge and most current information to achieve this end.

In this case, SHRM is interested in protecting its members by promoting rules that encourage employers to initiate and maintain, and employees to use, internal procedures that address complaints of unlawful harassment and discrimination. SHRM provides its members with written guidance and information on landmark court decisions that address workplace harassment and

discrimination. Indeed, SHRM's *amicus* brief filed in *Faragher* encouraged the Court to recognize a safe harbor for employers who implement and maintain strong anti-harassment policies when employees have not taken advantage of the internal complaint procedures; and the Court effectively adopted this concept of a safe harbor through the creation of the *Faragher/Ellerth* affirmative defense.

In addition, SHRM hosts conferences throughout the United States that include seminars and guest speakers addressing the current topics affecting the human resources profession, with topics including recent legal developments that involve employers and their obligations to comply with the law. At its conferences in 2003 alone, SHRM presented several programs aimed at assisting employers in preventing unlawful workplace harassment and discrimination, including "The Investigations Seminar", "Decoding Recent Legal Developments Into Plain English", "The Employee Handbook: Every Word Counts", "The Drive To Work—Understanding and Eliminating Sexual Harassment In the Workplace", "Writing Effective HR Policies and Procedures", and "Survivor IV: Avoiding Organizational and Personal Liability for Wrongful Discharge". SHRM provides this information and these programs to teach and motivate human resource professionals to develop and maintain anti-harassment and anti-discrimination policies and procedures that encourage and facilitate employees to report unlawful harassment and discrimination in the workplace. SHRM's ultimate goal is to provide human resource professionals with the means by which they can do their part in eradicating unlawful workplace harassment and discrimination.

From this vantage point, SHRM posits that the Third Circuit's holding in *Suders v. Easton*, 325 F.3d 432 (3d Cir.

2003), that constructive discharge is a tangible employment action, which precludes an employer from asserting the affirmative defense created by the Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (the "*Faragher/Ellerth* affirmative defense"), denigrates the spirit and purpose of federal and state anti-harassment and anti-discrimination laws. In particular, SHRM believes that the Third Circuit's decision controverts this Court's pronouncements, and provides employees with a legally-sanctioned end-run around the judicially approved internal human resources mechanisms designed to prevent and correct unlawful workplace harassment and discrimination. Accordingly, SHRM respectfully submits this brief in the furtherance of its mission to promote management policies that aim to eradicate unlawful workplace harassment and discrimination through efficient internal resolution channels.

INTRODUCTION

This Court's pronouncements in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), reiterated and refined in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), establish that "Title VII place[s] some limit on employer responsibility for the creation of a discriminatory environment by a supervisor"; and, further, that "an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination." *Faragher*, 524 U.S. at 792, 804 (citing *Meritor*, 477 U.S. at 72). Based on the parameters of employer liability first set forth in *Meritor*, this Court has determined that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the

employer's conduct as well as that of a plaintiff victim." *Faragher*, 524 U.S. at 780.

This Court crafted the *Faragher/Ellerth* affirmative defense in recognition of the fact that "[a]lthough Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), ***its 'primary objective,'*** like that of any statute meant to influence primary conduct, ***is not to provide redress but to avoid harm***." *Faragher*, 524 U.S. at 805-06 (emphasis added).

Additionally, this Court has noted that the EEOC has well-established regulations that advise employers to take all measures to prevent and correct promptly unlawful workplace harassment. *Faragher*, 524 U.S. at 806 (citing 29 C.F.R. § 1604.11(f) (1997)).[2] Thus, the statutory policy behind Title VII, in conjunction with the EEOC's enforcement efforts, require that courts "recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher*, 524 U.S. at 806. As such, an imposition of strict vicarious liability on an employer based on the misuse of power by a supervisor is contrary to the statutory policy of Title VII if it fails to provide employers with the incentive to implement and maintain effective anti-harassment policies and procedures. *Faragher*, 524 U.S. at 806.

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[2] Significantly, in the aftermath of *Faragher* and *Ellerth*, the EEOC issued a Notice entitled "Enforcement Guidance: Various Employer Liability for Unlawful Harassment by Supervisors." No. 915.002 (June 18, 1999) (acknowledging that the Supreme Court, in *Ellerth* and *Faragher*, found that "employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment").

The unequivocal mandate from this Court for employers to implement preventative and corrective measures addressing workplace harassment and discrimination has been accepted and respected by corporate America. Following the instructions from this Court in *Meritor, Faragher*, and *Ellerth*, in conjunction with encouragement, training and counseling from SHRM, human resource professionals see that the employment policies adopted by their employers both deter unlawful harassment and discrimination in the workplace, as well as provide legal protection from employee claims seeking judicial relief before invoking the employer's internal grievance system.

In this case, the Third Circuit's decision that constructive discharge is a tangible employment action runs afoul of the pronouncements of this Court and would ultimately eviscerate the employer's *Faragher/Ellerth* affirmative defense. The Third Circuit's holding necessarily precludes an employer's ability to assert the *Faragher/Ellerth* affirmative defense in the context of a constructive discharge and subjects the employer to strict liability for a supervisor's alleged sexual harassment upon the employee's resignation of employment. Indeed, finding constructive discharge to be a tangible employment action instantly transforms Title VII from a shield against discrimination into a sword against which an employer is rendered defenseless—a concept this Court has repeatedly rejected. *See Faragher*, 524 U.S. at 805-06; *Ellerth*, 524 U.S. at 764-65.

Indeed, of more concern, the Third Circuit's holding both encourages employees to resign their employment to achieve an advantage in litigating their allegations of unlawful workplace harassment, and simultaneously discourages them from invoking and utilizing their employers' internal grievance system before seeking judicial

redress. Thus, the Third Circuit's decision permits employees to craft employment claims against which an employer is left defenseless before the employee has even filed an internal complaint that would have given the employer the opportunity to prevent and correct the situation from escalating to a constructive discharge. As such, the Third Circuit's holding greatly diminishes, if not entirely eliminates, the incentive this Court offered to employers to disseminate and enforce strong anti-harassment policies. Also, that holding eliminates the employee's duty to exhaust internal procedures, and ultimately opens the judicial floodgates to employment litigation – something that this Court sought to avoid in *Faragher* and *Ellerth*. *See Faragher*, 524 U.S. at 805-06; *Ellerth*, 524 U.S. at 764-65.

This Court has repeatedly recognized that Congress devised Title VII to encourage employers to create anti-harassment policies and effective internal grievance mechanisms in an effort "to promote conciliation rather than litigation in the Title VII context." *Ellerth*, 524 U.S. at 764 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984); 29 C.F.R. § 1604.11(f)(1997)). As such, employer liability for harassment in the workplace must depend on an employer's efforts to create employment policies and procedures that aim to prevent and correct promptly unlawful workplace harassment. *Ellerth*, 524 U.S. at 764.

Hinging the availability of the *Faragher/Ellerth* affirmative defense on the employer's own conduct – and official, independent ratification of supervisor harassment – by requiring a "tangible employment decision" of the employer before imposing vicarious liability on the employer respects the "holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment." *Ellerth*, 524 U.S. at 763. Conversely, construing constructive discharge, **an**

employment decision made by the employee, as an employer's "tangible employment decision" under the rubric of *Faragher* and *Ellerth* destroys the defense to employer liability this Court recognized must exist.

If the Third Circuit's holding is adopted, an unfortunate message will be sent to employees that they need not report harassment and discrimination, but instead may terminate their employment and seek judicial relief in the first instance, making federal judges the "Senior Vice President of Human Resources" for the American workplace—precisely the result federal courts have sought to avoid. *See, e.g., Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (citations omitted) (federal courts "do not sit as a super-personnel department that re-examines an entity's business decisions"); *Keyes v. Secr. of Navy*, 853 F.2d 1016, 1024-25 (1st Cir. 1988) ("It is chancy business, indeed, for a court – on so interstitial a matter – to set itself up as a super-personnel evaluator . . ."). Indeed, by quitting instead of using the employer's internal grievance mechanisms, employees gain a tactical advantage in court by depriving their employer of an important defense. Moreover, if an employer's policies and internal grievance mechanisms offer an employer no incentive to avoid liability for decisions it did not make, will employers be as inclined to heed the mandate of this Court and the encouragement of SHRM to adopt and maintain them?

Here, SHRM seeks to persuade this Court that the Third Circuit's holding that constructive discharge constitutes a tangible employment action runs contrary to the pronouncements of this Court in *Meritor*, *Faragher* and *Ellerth* and ultimately impedes the goal of eradicating unlawful harassment and discrimination in the workplace through the cooperation of employers and employees rather than through premature judicial intervention.

SUMMARY OF ARGUMENT

The Third Circuit has held that an employee's constructive discharge constitutes a tangible employment action, which renders an employer strictly liable for the harassment of its supervisors. In so holding, the Third Circuit expressly rejected any rule that would require an employee alleging constructive discharge to show an official company act to prove a tangible employment action. The Third Circuit has reasoned that when an employee demonstrates that the work environment was so intolerable that the employee had no choice but to resign, the constructive discharge becomes the act of the employer, and thus qualifies as a tangible employment action.

Yet, it is counter-intuitive that an employee who suffers from threshold unlawful harassment will lose if he/she fails to complain, but an employee who suffers a substantially more egregious hostile work environment will be rewarded for not complaining, even though he/she had far more about which to complain. Indeed, the Third Circuit's holding sends the message to employees that they are better off not complaining initially because if the environment deteriorates, they can quit and prevail in court. As we explain below, among the reasons to reject the Third Circuit's holdings are:

First, the Third Circuit's reasoning contravenes this Court's holdings in *Meritor*, *Faragher* and *Ellerth*, which each recognize that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment.

Second, the Third Circuit's holding ignores this Court's efforts to promote the statutory policy behind Title VII, as well as the EEOC's enforcement efforts to recognize the employer's affirmative obligation to prevent violations

and give credit to employers who make reasonable efforts to discharge their duty. On the one hand, SHRM recognizes that the availability of the *Faragher/Ellerth* affirmative defense will not avoid liability in extreme cases where, even though the employer has actually discharged its affirmative obligation to implement and maintain anti-harassment policies and complaint procedures, the harassment was so egregious that the use of those policies would have been futile or could not have avoided imminent harm to the employee. In these extreme cases, the *Faragher/Ellerth* affirmative defense will still require the employer to prove that the employee's failure to utilize its policies was unreasonable. On the other hand, the wholesale deprivation of the *Faragher/Ellerth* affirmative defense for a decision that the employer did not make may serve to diminish the impetus to be vigilant in preventing and eradicating harassment and discrimination.

Third, the Third Circuit's holding glosses over this Court's decision in *Ellerth*, which defines "tangible employment decision" as an official act of the employer, usually documented in official records and subject to review by higher level supervisors, which bears the imprimatur of the employer. *See Ellerth*, 524 U.S. at 762. Instead, the Third Circuit supplants the requisite independent, official act of the employer with the independent, unreviewable act of the employee to impose strict vicarious liability on the employer for the unlawful, unreported, unauthorized acts of a rogue supervisor.

Finally, the Third Circuit's holding confers on employees an unbridled control over their workplace harassment and discrimination claims and confers on them a significant strategic advantage in the litigation of their Title VII lawsuits.

Accordingly, SHRM respectfully requests that the Court reject the Third Circuit's holding, and instead find that a constructive discharge does not constitute a tangible employment action for purposes of precluding an employer from asserting the affirmative defense created by the Court in *Faragher* and *Ellerth*.

ARGUMENT

Point I

Construing Constructive Discharge As A Tangible Employment Action Is Inconsistent with *Meritor* And Its Progeny.

This Court first set out the parameters of an employer's vicarious liability for the unlawful harassment by a supervisor in *Meritor*, which involved a claim of discrimination by a supervisor's sexual harassment of a subordinate over an extended period. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, while the Court held that a hostile work environment is actionable under Title VII, the Court determined that agency principles are relevant in assigning employer liability. *Meritor*, 477 U.S. at 70-72. The Court rejected the imposition of strict liability for a hostile environment created by a supervisor, finding that "some limitation was intended." *Meritor*, 477 U.S. at 70-72. Ultimately, the Court held that Title VII does not make employers "always automatically liable for sexual harassment by their supervisors." *Meritor*, 477 U.S. at 70-72.

In *Ellerth*, this Court concluded that because "Congress has directed federal courts to interpret Tile VII based on agency principles . . . a uniform and predictable standard must be established as a matter of federal law." *Ellerth*, 524 U.S. at 754. In so doing, the Court "rel[ied] 'on

the general common law of agency . . . to give meaning to [Title VII's terms 'employer' and 'agents'].'" *Ellerth*, 524 U.S. at 754-55 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)). In devising this standard, the Court first looked to Section 219(1) of the Restatement: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Ellerth*, 524 U.S. at 755-56 (quoting Restatement, Section 219(1)). The Court noted, however, that "[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer." *Ellerth*, 524 U.S. at 757. Thus, according to the Court, "[t]he general rule is that [unlawful] harassment by a supervisor is not conduct within the scope of employment." *Ellerth*, 524 U.S. at 757. Nonetheless, the Court opined that "although a supervisor's [unlawful] harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable . . .where its own negligence is a cause of the harassment." *Ellerth*, 524 U.S. at 759. Thus, "[n]egligence sets a minimum standard for employer liability under Title VII." *Ellerth*, 524 U.S. at 759.

Further, to find an employer vicariously liable for the unlawful harassment of a subordinate employee by a supervisor, the supervisor must have taken a tangible employment action against the subordinate. *Ellerth*, 524 U.S. at 760. Because the Court already established that "sexual harassment by a supervisor is not conduct within the scope of employment", *Ellerth*, 524 U.S. at 757, the "tangible employment action" contemplated by the Court must be an independent, official act of the employer other than the supervisor's unlawful harassment. In the constructive discharge scenario, however, the Third Circuit concluded that the supervisor's unlawful harassment is the

employer's employment action that causes the harm to the employee:

> ***By focusing on the actions of a supervisor and on the type of injury to a plaintiff***, it becomes clear that when a supervisor creates a hostile work environment so severe that an employee has no alternative but to resign, the official power of the enterprise is brought to bear on the constructive discharge.

Suders v. Easton, 325 F.3d 432, 459 (3d Cir. 2003) (emphasis added). Indeed, the Third Circuit went so far as to expressly "reject any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action." *Suders*, 325 F.3d at 459. However, in so holding, the Third Circuit entirely ignored the consistent pronouncements of this Court in *Meritor*, *Faragher* and *Ellerth* that mandate the utilization of agency principles to attribute actions of supervisors to employers for Title VII liability purposes. Under this mandate, a constructive discharge, as in the case of unlawful harassment itself, cannot qualify as a tangible employment action under the rubric of *Faragher* and *Ellerth* and violates the principles first established in *Meritor*.

Because Congress has relied on this Court's holding in *Meritor* when it amended Title VII in 1991, and due to the principles of *stare decisis*, this Court has declined to depart from its holding in *Meritor* concerning the limits of employer liability. *Faragher*, 524 U.S. at 804 n.4. Indeed, after *Meritor*, this Court has held that "[it] [is] not entitled to recognize [a theory of vicarious liability for misuse of

supervisory authority] under Title VII unless [it] can square it with *Meritor*'s holding that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination." *Faragher*, 524 U.S. at 804. Consequently, unlawful harassment by a supervisor, in and of itself, that ultimately causes a constructive discharge is insufficient to impose strict liability on the employer; and the employer should be afforded the opportunity to assert the affirmative defense crafted by this Court in *Faragher* and *Ellerth*. Not only does this agency principle respect the holding *Meritor*, it also does justice to the statutory policy of Title VII and the EEOC's enforcement efforts, both of which have been consistently recognized by this Court.

It is axiomatic that the holdings in *Meritor*, *Faragher* and *Ellerth* are not only consistent with agency principles, but they also provide employers with an incentive to adopt and enforce strong anti-harassment policies. Indeed, this approach is endorsed in SHRM's literature and training programs. By contrast, the holding of the Third Circuit would have the opposite effect. If employers are subjected to liability despite their efforts to prevent and remediate unlawful workplace harassment, they could become less motivated to adopt the policies and practices espoused by their human resource professionals and to devote time and financial resources to address this issue. This is not a result that SHRM—or this Court—should promote.

Point II

The Statutory Policy Encouraging Prevention Is At Odds With Finding Constructive Discharge To Be A Tangible Employment Action.

Consistent with this Court's recognition that it is constrained by its holding in *Meritor*, it also acknowledged that "[a]lthough *Meritor* suggested the limitation on employer liability stemmed from agency principles, . . . other considerations might be relevant as well." *Ellerth*, 524 U.S. at 764. In this vein, this Court has repeatedly recognized that the "primary objective" of Title VII is "to influence primary conduct, . . . not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)). Concurrently with that acknowledgement, this Court also recognized that "[a]s long ago as 1980, the EEOC, charged with the enforcement of Title VII. . . adopted regulations advising employers to 'take all steps necessary to prevent sexual harassment from occurring, such as informing employees of their right to raise and how to raise the issue of harassment'" and that "in 1990 the EEOC issued a policy statement enjoining employers to establish a complaint procedure 'designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." *Faragher*, 524 U.S. at 806 (quoting 29 C.F.R. § 1604.11(f)(1997); EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (Mar. 19, 1990)). Further, this Court has noted that:

> ***Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.*** Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, . . . and the EEOC's policy of encouraging the development of grievance procedures.

> To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.

Ellerth, 524 U.S. at 764 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984); 29 C.F.R. § 1604.11(f)(1997); EEOC Policy Guidance on Sexual Harassment, 8 BNA FEP Manual 405:6699 (Mar. 19, 1990); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995)) (emphasis added). In addition, this Court observed that "Title VII borrows from tort law the avoidable consequences doctrine, . . . and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances." *Ellerth*, 524 U.S. at 764 (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 n.15 (1982)).

Based on the foregoing, this Court determined that:

> It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. ***Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.***

Faragher, 524 U.S. at 806 (emphasis added). Against this backdrop, the Court created the *Faragher/Ellerth* affirmative defense:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765. The *Faragher/Ellerth* affirmative defense takes into account the "prophylactic" nature of Title VII and recognizes the imposition of an affirmative obligation on the employer to implement and maintain effective employment policies aimed at preventing and correcting unlawful harassment in the workplace. *See Ellerth*, 524 U.S. at 764. Nevertheless, the Court further held that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible

employment action, such as discharge, demotion or undesirable reassignment." *Ellerth*, 524 U.S. at 765.

Therefore, the Court required some adverse employment action taken by the employer, separate and apart from the supervisor's unlawful harassment, which constitutes a significant change in employment status or inflicts direct economic harm on the victim-employee. *See Ellerth*, 524 U.S. at 761-62. However, neither the unlawful harassment nor the employee's decision to terminate his or her employment constitutes an employment action contemplated by this Court. Indeed, neither is sufficient to deprive entirely the employer's ability to demonstrate that it has both heeded the mandate of this Court and respected the spirit and purpose of Title VII by fulfilling its affirmative obligation to implement and maintain employment policies and internal grievance mechanisms aimed at preventing and correcting promptly unlawful workplace harassment.

Point III

A Constructive Discharge Is Not A "Tangible Employment Action" Pursuant To This Court's Definition in *Ellerth*.

This Court defined tangible employment action in *Ellerth* as:

> . . . ***a significant change in employment status***, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. 761 (emphasis added). Further, a tangible employment action is an act taken by a "supervisor or other person ***acting with authority of the company***" that inflicts "***direct economic harm***" on the employee. *Ellerth*, 524 U.S. 762 (emphasis added). Moreover,

> [a] tangible employment decision ***requires an official act of the enterprise, a company act***. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the ***imprimatur of the enterprise and use its internal processes***.

Ellerth, 524 U.S. 762 (emphasis added).

Under that rationale, this Court unanimously opined that unlawful supervisory harassment does not constitute a tangible employment action because it is not an official act of the employer: "a supervisor's creation of a hostile work environment is neither within the scope of his employment, nor part of his apparent authority . . . . Indeed, a hostile work environment is ***antithetical*** to the interests of the employer." *Ellerth*, 524 U.S. at 769 (dissenting opinion) (emphasis added). Furthermore, the reaction of a victim-employee to the alleged unlawful workplace harassment, whether it be to tolerate or submit to sexual abuse or to quit employment, does not convert the unlawful harassment into a tangible employment action. *See Marsicano v. American Society of Safety Engineers*, No. 97-C-7819, 1998 WL 603128 at *6

(N.D. Ill. Sept. 4, 1998) ("as defined by the Supreme Court, the concept of tangible employment action for vicarious liability purposes does not embrace a responsive action on the part of the employee that brings about a change in employment status").. Therefore, to rise to the level of a tangible employment action, the employer, or the supervisor acting within the scope of his employment, must take some independent employment action, other than the harassment, that significantly changes the employee's employment status or directly inflicts economic harm on the employee. *Ellerth*, 524 U.S. at 761-62. In the case of a constructive discharge, however, there is nothing independent, but only the degree of harassment itself.

As noted in *Ellerth*, unlike unlawful harassment, a supervisor's employment decision that adversely affects the employee's employment is often accompanied by official paperwork and is subject to review and ratification by the employer. *See Ellerth*, 524 U.S. at 762. It is, therefore, reasonable to hold an employer responsible for the action recommended by the supervisor because the employer is given the opportunity to examine the circumstances on which the supervisor's decision rested to detect whether the supervisor's decision was ill-motivated. Thus, when ratified by the employer, the supervisor's decision becomes that of the employer; and agency principles are appropriately invoked.

Conversely, "unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer." *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 294 (2d Cir. 1999). As even the Third Circuit conceded, "as regards the specific event which terminates the employer-employee relationship, a constructive discharge may not bear the 'imprimatur of the enterprise' . . . in the same way as a

formal termination." *Suders*, 325 F.3d at 458 (quoting *Ellerth*, 524 U.S. at 762). Thus, when an employee quits his or her employment, the employer is presented with a *fait-accompli*, which requires no ratification from the employer and for which the employer had no prior notice and no opportunity to investigate the circumstances leading to that quit. Indeed, while the resignation by an employee may have been motivated by the conduct of a non-conforming supervisor, that conduct cannot be attributed to the employer because it neither bears the imprimatur of the enterprise nor does it invoke the employer's internal process. Additionally, while it is proper to require an employer to look behind the actions of its supervisors who recommend employment actions that adversely affect employees, it is both inappropriate and too onerous a burden for employers to attempt to question each employee who resigns. Even if the ex-employee would cooperate in an exit interview (and many will not), the Third Circuit expects the employer to investigate each and every resignation to ascertain whether any particular quit was due to unlawful workplace harassment that was never previously reported as required by company policy. Beyond that, once an employee quits, the employer loses any control over that employee and can no longer rectify a situation that the employee believed was beyond repair. For these reasons, agency principles do not come into play; and strict vicarious liability may not be imposed – especially for an employee who did not meet the second prong of the *Faragher/Ellerth* affirmative defense because he/she "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765.

Despite the foregoing, the Third Circuit disregarded the holdings of this Court when it expressly "reject[ed] any rule requiring a plaintiff-employee alleging a constructive

discharge to show an official company act in order to prove a tangible employment action." *Suders*, 325 F.3d at 459. In so doing, the Third Circuit boldly and inappropriately rejected the this Court's definition of tangible employment decision in *Ellerth*.

Point IV

Allowing A Plaintiff To Control Whether The Employer May Assert The *Faragher/Ellerth* Affirmative Defense Minimizes The Incentive For Employees To Complain To The Employer Prior To Commencing Legal Action.

This Court has determined that "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Kolstad v. American Dental Assoc.*, 527 U.S. 526, 545 (1999). However, the Third Circuit's decision did just that by giving employees a legally sanctioned way to make an end-run around the utilization of the employment policies and internal grievance mechanisms this Court has required employers to implement.

Further, the Third Circuit's holding proposes a rule that entirely ignores the significance of employer adopted anti-harassment policies and internal grievance mechanisms, which are encouraged and supported by SHRM. Because the Third Circuit's holding eliminates an employee's need to exhaust an employer's internal grievance mechanisms, employers' policies and procedures that designate specific members of management as agents to receive and act on harassment complaints become superfluous. Thus, while employers have implemented internal grievance mechanisms geared to address workplace harassment, which frequently

include contact individuals to whom employees may complain (including SHRM members or individuals who have been trained by SHRM members regarding topics such as how to recognize unlawful harassment, complaint intake procedures, confidentiality protection and effective listening techniques), the Third Circuit's holding sends employees an unmistakable message that the internal mechanisms are not of paramount importance. Instead of encouraging employees to exhaust the employer's internal grievance mechanisms, the Third Circuit's decision emboldens employees to disregard the procedures contained in employers' anti-harassment policies by terminating their own employment.

Additionally, this holding, by encouraging a bypass of the employer's internal mechanisms, drives employees into court and overburdens the already congested court dockets. For this reason, if the Third Circuit decision is affirmed, the employer's exposure to vicarious liability will be left to the control of the employee, without regard to the employer's efforts to comply with Title VII.

Finally, contrary to the pronouncements of this Court, the Third Circuit's holding diminishes the importance of the employers' affirmative obligation to provide internal grievance mechanisms because it renders the employer's efforts to comply with Title VII entirely irrelevant to the imposition of vicarious liability for the acts of a rogue supervisor who has ignored the instructions of the company's human resource professional to document employee performance issues and seek approval before taking any tangible employment action. Because the Third Circuit's decision renders employers' efforts to be good corporate citizens irrelevant as soon as an employee decides to quit and allege constructive discharge, employers may not make the implementation and maintenance of employment policies and internal grievance mechanisms a priority if they

will be discounted once an employee makes the decision to terminate his or her own employment – without ever taking the steps required under company policies to avoid conditions before they become intolerable.

By allowing employees to simply quit, allege constructive discharge, and file a claim under Title VII, the Third Circuit has assured plaintiff employees a tactical advantage of holding their employers vicariously liable for alleged unlawful harassment while depriving employers of the ability to assert a defense that should be available to companies who "do the right thing" but their employees do not.

CONCLUSION

For all of the foregoing reasons, SHRM respectfully requests that this Court reverse the Third Circuit's decision and hold that a constructive discharge does not constitute a tangible employment action.

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IN THE

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PENNSYLVANIA STATE POLICE,
Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Suders v. Easton, 325 F.3d 432 (3d Cir. 2003), *cert. granted* (No. 01-3512) ..... *passim*

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BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents more than three million businesses and organizations in every size, economic sector, and geographic region of the country. An important function of the Chamber is to represent the interests of its members in litigation raising issues of widespread concern to the

[1] Under this Court's Rule 37.6, amicus states that no counsel of any party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

American business community. The Chamber has participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, including numerous employment discrimination cases. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84 (2d Cir. 2002).

The Chamber fully endorses the need to afford protection for plaintiffs seeking redress for sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Following this Court's decisions in *Faragher* and *Ellerth* (as well as the earlier decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)), employers have made great strides in training managers and co-workers in what constitutes appropriate conduct, implementing zero-tolerance policies, establishing user-friendly, effective internal complaint procedures, and vigorously investigating complaints of sexual and other harassment in the workplace.[2] By recognizing an affirmative defense to strict employer liability for companies that adopt pro-active training and remedial action,[3] this Court set in motion important behavioral incentives, for both companies and potential victim employees, that have had an enormously

[2] The anti-harassment policies and practices of leading companies, including JP Morgan Chase, Atlantic Richfield, the Segal Company, and Credit Suisse First Boston, are described in Sexual Harassment in the Workplace: Proceedings of New York University 51st Annual Conference on Labor (S. Estreicher ed., Kluwer Law International, 1999).

[3] An affirmative defense to hostile work environment liability exists where the employer (1) "exercise(s) reasonable care to prevent and correct promptly any sexually harassing behavior," and where the plaintiff (2) "unreasonably failed to take advantage of any preventive corrective opportunities provided by the employ[er] or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

beneficial influence in fostering a supportive, non-harassing workplace culture for women, racial and ethnic minorities, and indeed all Americans.

The Court in *Faragher* and *Ellerth*, of course, ruled that this affirmative defense would not be available when one or more supervisors have taken a "tangible employment action" against the complaining employee. This critical term, although not defined, was not an open-ended invitation to judicial creativity, for the Court made clear that it had in mind decisions, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790. What these actions all have in common is that they involve "company act[s]," where the company as an entity must act to effect the decision, and hence it is reasonable to presume that notice to the company must or should have preceded the decision. *Ellerth*, 524 U.S. at 762 ("A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.").

The court of appeals' decision in this case, however, threatens to undermine the incentives provided by *Faragher* and *Ellerth*. It broadens the concept of tangible employment action to include employee resignations that a court later characterizes as a "constructive discharge." But a constructive discharge is simply a legal construct for treating a resignation as a discharge for the limited purpose of allowing the plaintiff to argue that his or her resignation should not be treated as a wholly voluntary act. A resignation, whether or not it is later labeled a constructive discharge, cannot be treated as a tangible employment action within the meaning of *Faragher* and *Ellerth*. A resignation does not involve a company act that reasonably puts the company on notice of a

potential claim or possible supervisor misconduct. In such circumstances, it makes no sense to declare the *Faragher-Ellerth* affirmative defense unavailable and to impose strict liability on the employer.

If this Court concludes that a constructive discharge is a tangible employment action, judicial inconsistency in the area of sexual harassment law is inevitable. Constructive discharge law is not an appropriate substitute for the clear standards set forth in the *Faragher-Ellerth* defense. Because constructive discharge law incorporates only a standard of reasonableness, which may or may not require notice by the employee before resigning, the law is necessarily in a state of flux, with results depending less on the law and more on the particular sympathies of each case.

If a constructive discharge is viewed as a tangible employment action, an employee may have a more valuable claim by resigning, rather than by remaining employed. The employer community is concerned that if the Third Circuit's approach is widely followed, a perverse incentive will be created to encourage employees to resign without providing notice of the potentially offending conduct, thereby impeding an employer's ability to remedy the situation and to prevent its recurrence.

STATEMENT OF THE CASE

This case presents an important issue under Title VII: whether a constructive discharge is a tangible employment action that deprives an employer of the *Faragher-Ellerth* affirmative defense. It is an issue that currently divides the courts of appeals, and is of significance to employers nationwide.

On or about March 23, 1998, respondent Nancy Suders began working as a police communications operator with the Pennsylvania State Police ("State Police"). Pet. App. 6a. Suders alleged that from the start of her employment, she

suffered sexual harassment so severe that she felt compelled to resign *only five months later*—on August 20, 1998. She named defendants Sergeant Eric D. Easton, Patrol Corporal William D. Baker, and Corporal Eric B. Prendergast as the principal offenders. *Id.*

Suders admittedly knew of the State Police's policy prohibiting sexual harassment, which was posted at her barracks and distributed to all employees. Pet. App. 79a. In June 1998, and as part of her training, Suders also attended a seminar on sexual harassment led by the State Police's equal employment officer, Virginia Smith-Elliot. Pet. App. 10a. At that time, Suders told Smith-Elliot that she might need some help, but did not provide any details. *Id.* Smith-Elliot gave Suders her telephone number, but never heard from Suders until August 18, 1998, two days before her resignation. *Id.* at 10a-11a.

On August 18, Suders contacted Smith-Elliot and told her that she was being harassed.[4] According to Suders, Smith-Elliot told her to fill out a complaint form, but did not tell her where to obtain the form. According to Smith-Elliot, however, she promised to send Suders the complaint form. Pet. App. 11a.

Two days after her conversation with Smith-Elliot, Suders resigned. The precipitating cause appears to have been an incident relating to scores she received on a computer skills test. Pet. App. 11a-12a. Suders' supervisors had told her that she repeatedly failed the computer skills test, but Suders had not seen her actual scores. In an effort to find the test results, she went through a drawer in the women's locker room. She found the test papers and removed them. *Id.* Once it was discovered that these papers were missing, officers dusted the

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[4] According to Smith-Elliot, Suders did not complain of sexual harassment, but complained only of age and political affiliation discrimination. Pet. App. 11a.

drawer with theft detection powder. On August 20, 1998, Suders went back into the drawer, allegedly to return the test papers, but the powder turned her hands blue. *Id.* When confronted, she told Corporal Baker that she was resigning. Suders claimed that she was then treated as a suspect, and was handcuffed, photographed, and questioned. Suders then turned in a letter of resignation that she had been carrying with her, and eventually was permitted to leave. *Id.*

Suders thereafter filed suit, alleging violations of Title VII; the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 *et seq.* After the parties completed discovery, the State Police moved for summary judgment. Pet. App. 13a.

The district court granted the motion for summary judgment in its entirety. Pet. App. 62a-82a. With respect to Suders' sexual harassment claim, the district court held that issues of fact existed as to whether Suders had been subject to a hostile work environment. The court held, however, that the State Police had established an affirmative defense to vicarious liability for the actions of its supervisors. *Id.* at 80a. The court found it dispositive that Suders did not give the State Police any meaningful time to respond to her complaints. In the court's words (*id.*),

> Plaintiff finally did contact Smith-Elliot on August 28, 1998, however, this was only two days before she resigned. Smith-Elliot told Plaintiff to fill out a complaint form, located in the Administrative Regulation manual. However, Plaintiff resigned from her employment two days later, and the PSP was never given the opportunity to respond to any complaints of sexual harassment.

On appeal, the Third Circuit concluded that the district court erred in two respects. First, the panel held, summary judgment was inappropriate because a material dispute of fact

existed as to whether the State Police exercised reasonable care to prevent or correct the sexual harassment that Suders allegedly suffered. Pet. App. 20a. Neither the State Police nor the Chamber challenge this aspect of the appeals court's holding.

Although the court of appeals could have ended its discussion at this point, the court turned to what it stated was the critical issue: whether a constructive discharge, when proved, constitutes a tangible employment action. Pet. App. 28a.

The court acknowledged the existence of a square conflict among the circuits on this issue. Pet. App. 39a-41a. It noted that the Second and Sixth Circuits have held that a constructive discharge does not constitute a tangible employment action, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999); *Turner v. Dowbrands Inc.*, 2000 WL 924599 (6th Cir. 2000) (unpublished), whereas the Eighth Circuit has reached the opposite conclusion. *Jaros v. LodgeNet Entertainment Corp.* 294 F.3d 960, 966 (8th Cir. 2020); *Jackson v. Arkansas Dept. of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001).

Rejecting the reasoning set forth by the Second and Sixth Circuits, the court of appeals held that a constructive discharge does constitute a tangible employment action under *Faragher* and *Ellerth*. According to the court, when a constructive discharge is proven, the trier of fact may not consider the employer's *Faragher-Ellerth* affirmative defense, but instead must hold the employer strictly liable—irrespective of whether any notice of the underlying misconduct had been provided to the employer, or whether the plaintiff by invoking the internal complaint procedure effectively and promptly could have put a halt to the offending conduct. Pet. App. 57a.

SUMMARY OF ARGUMENT

Under *Faragher* and *Ellerth*, a constructive discharge does not constitute a "tangible employment action" for which the employer is automatically held vicariously liable for the acts of its supervisors.

A constructive discharge, by its nature, is not the sort of "official company act," *Ellerth*, 524 U.S. at 762, for which this Court has deemed it appropriate to hold an employer strictly liable. Unless an employee reports conduct to the employer, the employer will not have an opportunity to investigate, to correct the problem, and to provide an effective remedy to the victim.

An important policy underlying both *Faragher* and *Ellerth* is that employers should encourage employees to report harassing conduct by a supervisor, and the method of encouragement selected by the Court is a rule of contingent liability for the employer. Accordingly, the employer is afforded an affirmative defense to vicarious liability when the supervisor's harassment does not culminate in a tangible employment action—*i.e.*, an "official company act" that the employer could detect even in the absence of a complaint by the affected employee.

To equate a constructive discharge with an actual termination for *Faragher-Ellerth* purposes, as the court of appeals has done, distorts well-established understandings of constructive discharge doctrine. A constructive discharge is simply a legal construct for treating a resignation as a discharge for the limited purpose of allowing the plaintiff to argue that it should not be treated as a wholly voluntary act. A resignation remains, however, quite distinct from a tangible employment action for purposes of the *Faragher-Ellerth* defense. A resignation does not involve a company act that reasonably puts the employer on notice of a potential claim. Even where a resignation generates some documentation

under the employer's standard procedures, the mere fact of a resignation cannot be converted into an act of the company, and such an act is essential if strict liability is to be imposed.

To claim constructive discharge, an employee in most instances need not provide her employer with notice of sexual harassment prior to resigning. Whether or not a particular resignation should be treated as a constructive discharge depends entirely on a standard of reasonableness under all the circumstances. The court of appeals' decision provides no incentive for employees to report improper conduct well before quitting their employment.

The standards set forth in *Ellerth-Faragher* have had a positive influence on the business community and the environments in which employees work. The vast majority of businesses now have harassment policies, and progress continues. The court of appeals' ruling threatens that progress, and threatens as well the consistent procedural rules developed under *Ellerth* and *Faragher* that have served to encourage employers to make substantial investments in harassment training and prevention.

ARGUMENT

A. Treating a Constructive Discharge as an Occasion for Strict Employer Liability Undermines the Critical Behavioral Incentives this Court Fashioned in *Faragher* and *Ellerth*.

In *Faragher* and *Ellerth*, the Court confronted the question of which standard of liability should be imposed on employers when their supervisors engage in unlawful harassment. The spectrum of liability ranged from simple negligence (the standard governing co-worker harassment) to strict or "automatic" vicarious liability. To promote Title VII policies encouraging both employer internal compliance with anti-harassment mandates and claimant minimization of harm (by

invoking available, effective internal procedures), the Court recognized that, save for "tangible employment actions," employer liability should be conditional, subject to an affirmative defense. The circuits recognizing a constructive discharge exception to this framework threaten to unravel the beneficial incentives for transforming workplace culture that this Court provided in *Faragher* and *Ellerth*.

1. *Faragher* and *Ellerth* Implicitly Rejected Constructive Discharge as a Tangible Employment Action

This Court did not address specifically in *Faragher* and *Ellerth* whether constructive discharge is a tangible employment action. But that is not the full story. The plaintiff in *Ellerth* alleged, and this Court had before it, a claim of constructive discharge. *Ellerth*, 524 U.S. at 749. Despite this claim, the *Ellerth* and *Faragher* decisions did not include "constructive discharge" as one of the enumerated examples of tangible employment actions. *See Ellerth,* 524 U.S. at 761 (describing tangible employment actions as those that "constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

It is not surprising that, in the aftermath of the *Ellerth* and *Faragher* decisions, this Court's omission of constructive discharge in its discussion of tangible employment actions was widely regarded as a purposeful one. *See, e.g.*, *Caridad v. Metro-North Commuter R.R.*, 191 F. 3d 283, 283 (2d Cir. 1999) ("the facts of *Ellerth* . . . indicate that constructive discharge is not a tangible employment action"); *Shoiber v. Elmro*, 1999 WL 825275, at *5 (N.D. Ill. Sept. 21, 1999); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1019 (S.D. Ohio 1999); *Desmarteau v. City of Wichita*, 64 F. Supp. 2d 1067, 1079 (D. Kan. 1999)(claims that constructive discharge is a

tangible employment action "dispelled by the [*Ellerth*] case in which the plaintiff alleged that she had been constructively discharged."). That is, this Court could have included, but chose not to include, constructive discharge as a species of tangible employment action.

Based on a review of *Ellerth*'s procedural history, the court of appeals observed that this Court was not asked to decide any question regarding constructive discharge, and, on that basis, the court dismissed any suggestion that *Ellerth* provides guidance on whether a constructive discharge can constitute a tangible employment action that would deprive an employer of the *Ellerth-Faragher* affirmative defense. Pet. App. 47a-48a. The court of appeals, however, has taken too cramped a view of the decision and reasoning in *Ellerth*.

It is not merely that this Court did not include constructive discharge in its list of examples of tangible employment actions. The Court also allowed Burlington, the defendant in *Ellerth*, to assert its affirmative defense on remand—even in light of plaintiff's constructive discharge claim. *Ellerth*, 524 U.S. at 766. In remanding, this Court concluded that, "*[a]lthough Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik*, which would deprive Burlington of the availability of the affirmative defense, this is not dispositive. In light of our decision, Burlington is still subject to vicarious liability for Slowik's activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability." *Id.* (emphasis added). In fact, the very question presented in *Ellerth* presupposes, properly so, that constructive discharge is *not* a tangible employment action. *Id.* at 747 ("[w]e decide whether . . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, *yet suffers no adverse, tangible job consequences. . .*").

The court of appeals therefore was too quick to conclude that *Ellerth* offers nothing instructive for the present case. Pet. App. 48a. But even putting aside the specific allegations by the plaintiff in *Ellerth*, and the terms of this Court's remand, the rationale for imposing strict employer liability in the context of tangible employment actions simply does not extend to constructive discharge.

2. A Constructive Discharge Is Not "An Official Act of the Enterprise" Under *Faragher* and *Ellerth.*

Constructive discharge is not "an official act of the enterprise" that should preclude assertion of the *Ellerth-Faragher* defense. By their very nature, tangible employment actions involve "an official act of the enterprise," *Ellerth*, 524 U.S. at 762, which, in most cases, "inflicts direct economic harm." *Id.* As stated above, such actions must "constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Although the examples provided by the Court of tangible employment actions were not exhaustive, they all involved an *act* by the employer as an entity, an act that the Court decided the employer should not be permitted to seek to excuse through the *Ellerth-Faragher* affirmative defense. Constructive discharge involves no such act; it merely provides a basis for an employee to avoid the otherwise voluntary character of a decision to resign.

The rationale for holding an employer strictly liable when a supervisor's harassment culminates in discharge, demotion, or other tangible employment action is that the supervisor, by taking such action, becomes the employer's "proxy": "he 'merges' with the employer, and his act becomes that of the employer." *Faragher*, 524 U.S. at 790. Additionally, because

a tangible employment action is an "official company act," *Ellerth*, 524 U.S. at 762, the Court concluded that the employer, in most cases, has the opportunity to review and evaluate the supervisor's action after the fact:

> A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

Ellerth, 524 U.S. at 762. The company may also have the opportunity to evaluate the supervisor's action before it is taken, if prior approval is required. *See id.* ("The supervisor often must obtain the imprimatur of the enterprise and use its internal processes."). The underlying policy judgment is that unconditional strict liability for harassment culminating in a tangible employment action will provide employers with a greater incentive to review and to monitor their supervisors' official decisions and actions.

This policy judgment is inapposite when an employee resigns, and later alleges a constructive discharge. What is missing is the "official company act"—an action that is documented and subject to review by higher management. Because the employee ultimately controls the decision whether and when to resign, and reasons need not be given (and ordinarily are not required as a prerequisite for later claiming a constructive discharge), the resignation may come as a complete surprise to the employer. A resignation simply does not afford the employer sufficient opportunity to react and remedy a problem. It does not put the enterprise on notice that the circumstances occasioning the resignation may involve supervisory misconduct. Indeed, only a rule that treats constructive discharge claims as subject to the *Faragher-Ellerth* defense creates an incentive for the claimant to put the employer on such notice.

For this reason, the court of appeals' stated rationale—to "effectively encourage employers to be watchful of sexual harassment in their workplaces and to remedy complaints at their earliest possible moment"—does not withstand scrutiny. Pet. App. 56a. An employer cannot remedy those complaints that it does not know exist, and it cannot investigate allegations that are not brought to its attention.

3. The Concept of Constructive Discharge Serves Only to Supply One Element of the Plaintiff's Prima Facie Case. It Has No Bearing in Determining Those Occasions Warranting Strict Employer Liability.

To assert a claim under Title VII, a plaintiff must demonstrate an "adverse employment action." Pet. App. 3a n.1. This is a necessary element of a prima facie case under Title VII. *Id.*

A person who voluntarily resigns from employment has not, on the face of things, suffered an adverse employment action, and therefore has no cause of action under Title VII. A constructive discharge, however, if proven, permits a plaintiff to transform a non-actionable event—a resignation—into a potentially viable claim. Thus, a constructive discharge serves the limited purpose of supplying plaintiff with one element of the prima facie burden. *See Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) ("When a constructive discharge is found, an employee's resignation is treated—*for the purpose of establishing a prima facie case* of employment discrimination—as if the employer had actually discharged the employee.") (emphasis added).

As the court of appeals itself recognized in this case, the concept of a tangible employment action under *Faragher* and *Ellerth* is distinct from, and narrower than, that of an adverse employment action. Pet. App. 3a n.1 ("we understand a tangible employment action as being a narrower, more

restricted category of actions occurring in the workplace"). Despite this acknowledgement, however, the court of appeals effectively ended its analysis with the conclusory judgment that a constructive discharge is the functional equivalent of a termination. *See id.* at 50a, 54a ("[i]n the same way as a formal discharge, a constructive discharge 'constitutes a significant change in the employment status,' by ending the employer-employee relationship.") The court failed to consider that, in reality, the employee and employer play very different roles when an employee resigns, as opposed to when an employer effects a discharge.

As described above, *Ellerth* made clear that "a tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." 524 U.S. at 762. The company also may have the opportunity to evaluate the supervisor's action before it is taken, if prior approval is required. *See id.* ("The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.").

Where an employee resigns, however, higher level management typically has no opportunity to weigh in on the employee's decision. The act of resignation is inherently ambiguous. There are many reasons that employees quit that have nothing to do with the employment relationship. As mentioned, employees do not always give reasons, nor is the giving of reasons always required. Absent a rule effectively requiring the provision of notice to the employer—a rule suggested by *Faragher* and *Ellerth* but rejected by the panel below—an employer may have no reason to suspect that misconduct of any kind prompted the resignation.

Under these circumstances, strict liability is not the appropriate legal standard. It is the resigning employee, not the employer, who has "acted." Of course, a plaintiff may pursue a Title VII claim via a constructive discharge theory even

where no notice to the employer has occurred. But the employer should not be foreclosed, in these circumstances from demonstrating that the *Faragher-Ellerth* defense is meritorious on the facts.

In short, except in cases where the claim arises from one or more "official act[s] of the enterprise," *Ellerth*, 524 U.S. at 762, the *Faragher-Ellerth* affirmative defense holds employers to the correct standard. Employers are called to account when they turn a blind eye towards an employee complaint, and, conversely, they should be able to avoid strict liability if they take seriously their internal compliance duties by investigating and remedying claimed misconduct brought to their attention and the claimant has unreasonably failed to utilize these procedures.

B. Excluding Constructive Discharge Claims from the *Ellerth-Faragher* Defense Undermines Uniformity in Employment Discrimination Claims.

The business community has responded vigorously to recent developments in the law governing sexual harassment claims and, in particular, to this Court's decisions in *Faragher* and *Ellerth*. A large majority of employers (97 percent of those responding in one survey) reported that they have written policies against sexual harassment. Similarly, most employers have established formal investigatory procedures for responding to sexual harassment complaints, and large numbers of employers (62 percent of those responding in the same survey) provide sexual harassment prevention training. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's L.J. 3 (2003). Although these measures, of course, cannot guarantee that all harassing conduct will be eliminated from the workplace, they have begun to break the culture of overlooking or tolerating such wrongdoing.

The impact of this Court's rulings in *Ellerth* and *Faragher* has its own lesson: employers seek specific and consistent guidelines with regard to harassment response and prevention. That consistency is now threatened: excepting constructive discharge from the *Ellerth-Faragher* defense undercuts the incentives driving the business community's recent progress in creating and enforcing policies against harassment.

The court of appeals' ruling here would chill further progress in this area. Although the court confidently predicts that the reasonableness test embodied in constructive discharge law will stymie any incentive for irresponsible behavior on the part of victimized employees (Pet. App. 56a-57a), that prediction almost certainly is overly optimistic. Constructive discharge law lacks the consistency of result that would be needed to support the court of appeals' reasoning on this point.

As the court of appeals acknowledged, there are important intersections between constructive discharge law and the *Ellerth-Faragher* defense. Pet. App. 58a. Specifically, the two share similar, but nevertheless different, "reasonableness" standards under which a jury can review both the employee's and the employer's conduct. This similarity leads to confusion. To accommodate these similar but different reasonableness standards under *Ellerth-Faragher* and constructive discharge law, the lower courts that have held that a constructive discharge constitutes a tangible employment action have created *ad hoc* rules regarding constructive discharge to account implicitly for the to *Ellerth-Faragher* defense. *See, e.g., Jones v. U.S.A. Petroleum Corp.*, 20 F. Supp. 2d 1379 (S.D. Ga. 1998) (finding constructive discharge to be a tangible employment action and simultaneously creating additional requirements for proof

of constructive discharge). This results-based decision-making—often on a case-by-case basis—provides no consistent guidance to the business community.

In addition, depending on the state of constructive discharge law in a particular jurisdiction, legal inconsistency necessarily will occur. Different burdens will be placed on plaintiffs, depending on the jurisdiction, and not the facts. For example, a plaintiff in one jurisdiction who alleges constructive discharge may not be able to prevail on her claim without establishing that notice was given to the employer before resigning. A plaintiff in another forum may not have a similar burden. *Compare Gawley v. Indiana Univ.*, 276 F.3d 301, 315 (7th Cir. 2001) (rejecting constructive discharge claim because "quitting was not the only option available to [the plaintiff] because of the university's procedures for victims of harassment."); *Woods v. Delta Beverage Group Inc.*, 274 F.3d 295, 301 (5th Cir. 2001) (rejecting constructive discharge claim because reasonable person would not have felt compelled to resign; reasonable person would have felt compelled to complain); *with Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747 (3d Cir. 1990) ("notice is not always required to sustain a case of constructive discharge.").

In short, allowing the *Ellerth-Faragher* defense to proceed in constructive discharge settings furthers the salutary employment incentives of this Court, and ensures consistency and continued progress in the area of harassment prevention and training.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 03-95

PENNSYLVANIA STATE POLICE,
Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The brief urges this Court to reverse the decision below, and thus supports the position of the petitioner, the Pennsylvania State Police. The written consents of both the petitioner and the respondent have been filed with the Clerk of this Court.

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 330 of the nation's largest private sector corporations, which collectively employ more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), *as amended*, 42 U.S.C. §§ 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC members have a strong interest in the issue presented for the Court's consideration – the appropriate legal standards for determining an employer's liability for sexual harassment in the workplace under Title VII.

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Pennsylvania State Police employed respondent Nancy Drew Suders as a police communications operator ("PCO") at its McConnellsburg barracks, beginning on or about March 23, 1998. Pet. App. at 6a. In June 1998, Suders attended a formal training class on sexual harassment that was taught by the police department's Equal Employment Opportunity Officer ("EEO Officer"). *Id.* at 10a. Without mentioning any details, Suders allegedly told the EEO Officer that she might need some help. The officer gave her phone number to Suders, but Suders did not pursue the matter. *Id.*

Two months later, Suders again contacted the department's EEO Officer, this time to complain that she was being harassed and was afraid. *Id.* at 11a. The officer advised Suders to file a complaint on a standard form. *Id.* Suders resigned two days later without having filed a complaint, thereby depriving the department of the opportunity to respond to her allegations before she quit. *Id.* at 80a.

Suders sued the department for, among other things, sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* In her lawsuit, Suders claimed that her station commander and a patrol corporal, both of whom exercised some supervisory responsibilities at the barracks, had directed obscene and offensive sexual remarks and gestures towards her throughout her employment. *Id.* at 6a. She alleged their actions created a hostile work environment that was so intolerable that she felt compelled to resign. *Id.* Suders, however, never complained to anyone at her barracks about the harassment before resigning, although she once allegedly asked the patrol corporal, without success, to stop his offensive conduct. *Id.* at 10a.

The United States District Court for the Middle District of Pennsylvania granted summary judgment in favor of the department on Suders's sexual harassment claim. *Id.* at 14a.

The district court concluded that although Suders may have experienced a hostile work environment, the department had proven as a matter of law the affirmative defense to liability for the supervisors' conduct that this Court had established in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *Id.* at 80a. The district court did not address the merits of Suders's constructive discharge claim. *Id.* at 14a. On appeal, the Third Circuit reversed, ruling that a constructive discharge, if proven, constitutes a tangible employment action that would preclude an employer from relying on the affirmative defense to liability set forth in *Ellerth* and *Faragher*. *Id.* at 5a. Petitioner sought and was granted this Court's review of the Third Circuit's decision.

SUMMARY OF ARGUMENT

This Court recognized an affirmative defense to employer liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, for sexual harassment by a supervisor under certain circumstances in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under *Ellerth* and *Faragher*, an employer may raise the affirmative defense, unless a supervisor took a "tangible employment action" against an employee. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

A constructive discharge is not a "tangible employment action" that would render an employer strictly liable for sexual harassment committed by a supervisor under *Ellerth* and *Faragher*. These cases require an official company act to prevent an employer from raising the affirmative defense to harassment. *Ellerth*, 524 U.S. at 762. To constitute an official company act, a supervisor must directly take a concrete action against the employee for a discriminatory reason. *Id.* In contrast, a constructive discharge is an intangible legal creation, which lacks an official stamp of company approval.

Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999).

This Court's application of the affirmative defense in *Ellerth* strongly supports a finding of no liability where the employee did not complain about harassment prior to quitting. Moreover, a constructive discharge cannot exist as a matter of law where an employer has a well-communicated antiharassment policy, timely investigates grievances, and takes appropriate action in response to complaints. *See Lee-Crespo v. Schering-Plough Del Caribe Inc.*, __ F.3d __, 2003 WL 23095261, at *9 (1st Cir. Dec. 31, 2003). Even those courts that have concluded that a constructive discharge, if proven, would constitute a tangible employment action have focused on the reasonableness of the employee's actions in resigning and the employer's response once it found out about the harassment. *Jackson v. Arkansas Dep't of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002). By using the same analysis as the affirmative defense, only under a different name, a constructive discharge claim simply duplicates the affirmative defense.

As a practical matter, reversing the Third Circuit's decision will further the important public policy this Court articulated in *Ellerth* and *Faragher* of preventing discrimination by motivating employers to develop effective antiharassment policies and grievance procedures and employees to complain promptly. *Ellerth*, 524 U.S. at 764. Both before and after the *Ellerth* and *Faragher* decisions, employers have poured substantial resources and efforts into developing well-communicated, effective antiharassment policies and grievance procedures to combat workplace sexual harassment. The unfairness of allowing an aggrieved individual's unpredictable personal response to certain conduct to control an employer's vicarious liability for harassment also will divert employers' attention away from developing such policies by weakening the value of the affirmative defense. If

an employee can make an employer strictly liable for harassment simply by quitting and claiming a constructive discharge, having a complaint procedure and remedial policy would be pointless. The decision below will jeopardize these preventive measures, and must be reversed.

ARGUMENT

I. A CONSTRUCTIVE DISCHARGE IS NOT A "TANGIBLE EMPLOYMENT ACTION" THAT WOULD RENDER AN EMPLOYER STRICTLY LIABLE FOR SEXUAL HARASSMENT COMMITTED BY A SUPERVISOR UNDER *ELLERTH* AND *FARAGHER*

A. *Ellerth* and *Faragher* Require An Official Company Act To Prevent An Employer From Raising An Affirmative Defense To Harassment

1. An official company act requires a concrete action directly taken by the harassing supervisor for a discriminatory reason

This Court recognized an affirmative defense to employer liability under Title VII of the Civil Rights Act of 1964 for sexual harassment by a supervisor under certain circumstances in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In those cases, this Court ruled that unless the supervisor's harassment results in a "tangible employment action," the defending employer may raise an affirmative defense to liability and damages for harassment by showing two things: (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) that the alleged victim "unreasonably failed to take advantage of any preventive or corrective" measures the

employer provided "or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08. An employer's ability to raise the affirmative defense thus depends on whether the employee experienced a tangible employment action.

Under *Ellerth* and *Faragher*, only the actions of "a supervisor with immediate (or successively higher) authority over the employee" can impose vicarious liability on an employer for harassment under Title VII. 524 U.S. at 765. This focus on supervisory action is reinforced by the Court's explanation in *Ellerth* that the affirmative defense is unavailable only "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.*

This Court drew its analysis directly from agency principles, which dictate when an individual has authority to act on behalf of another. In the employment context, this Court has identified

> [t]angible employment actions [as] the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.

Ellerth, 524 U.S. at 762 (citation omitted).

Under the agency principles cited by this Court in *Ellerth*, imposing strict liability on an employer is warranted only when a supervisor exercises his or her authority to make an employment decision that directly affects a subordinate in a tangible, real way. "A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the

authority of the company, can cause this sort of injury. . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.* at 762. Holding employers strictly liable under Title VII only for concrete employment decisions, such as terminations or demotions, that are directly taken by their supervisors for a discriminatory reason faithfully adheres to these established agency principles. Thus, it follows that the Court intended the affirmative defense to be available in all other situations.

2. A constructive discharge lacks an official stamp of company approval

Constructive discharge claims fall into the category of employment actions that are independent of an individual's supervisory authority, and thus do not warrant imposition of strict liability against an employer. As this Court recognized in *Ellerth*, not all harassing behavior by supervisors is aided by the agency relationship. "[T]here are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where a supervisor's status makes little difference." *Ellerth*, 524 U.S. at 763. Unless the supervisor's actions required the use of his or her managerial authority, the employer should not be held strictly liable for the harassment.

As the Second Circuit pointed out in *Caridad*, "[c]o-workers, as well as supervisors, can cause the constructive discharge of an employee." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999). Moreover, "unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer." *Id.* While a supervisor's actions may have contributed to a hostile work environment, the actual decision to end the employment relationship "is not an action *taken by* an employee's supervisor." *Alberter v.*

McDonald's Corp., 70 F. Supp.2d 1138, 1147 (D. Nev. 1999) (emphasis added).

Instead, constructive discharge is an intangible legal fiction that the courts have created to give individuals who resign a cause of action against their employer under certain circumstances. It is not an actual, real employment decision made directly by a supervisor, such as a termination or a demotion. For these reasons, a constructive discharge therefore lacks the official stamp of company approval that is necessary to impose strict liability on an employer for harassment under Title VII. *See Ellerth*, 524 U.S. at 762.

The Seventh Circuit's artificial distinction in *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), between a constructive discharge caused by supervisors and one caused by co-workers ignores *Ellerth*'s requirement for an official company act. In *Robinson*, the Seventh Circuit held that "where '*official* actions by the supervisor . . . make employment intolerable,' we believe a constructive discharge may be considered a tangible employment action." *Id.* at 336 (citation omitted).

As a preliminary matter, a hostile work environment may be the result of offensive conduct by multiple people, including both supervisors and co-workers. Therefore, the difficulty in separating out situations in which a constructive discharge is caused solely by a supervisor's harassment, as opposed to co-worker conduct, makes the Seventh Circuit's distinction unworkable.

More significantly, *Robinson*'s focus on the identity of the harasser will make employers strictly liable under Title VII *any* time a supervisor allegedly harasses an employee, an outcome this Court expressly rejected in *Ellerth* and *Faragher*. Any time an employee claims a constructive discharge based on a supervisor's harassment, the employee probably will be able to point to incidents that reflect the

supervisor's authority to manage the employee's work. For example, an employee who receives an undesirable project or unfavorable performance review likely will claim that these are "official actions" taken by the supervisor that made the work environment so intolerable that a reasonable person would have resigned, warranting strict liability on the employer under *Robinson*. This Court, however, explicitly refused to hold employers always accountable for their supervisor's actions by reserving strict liability for situations in which a supervisor has caused a "*significant* change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761 (emphasis added).

Nor did the Seventh Circuit even need to adopt this tortured interpretation of a tangible employment action in *Robinson*. In that case, a high-level manager officially reassigned the employee to an undesirable position to separate her from a harassing supervisor, describing her new position as likely to be "hell." *Robinson*, 351 F.3d at 324. Since the manager's supervisory authority over the plaintiff enabled him to make the transfer, the reassignment probably would have qualified as an official company act, thus precluding the employer from raising the affirmative defense under *Ellerth* anyway. *Robinson* therefore shows the danger of treating a constructive discharge as a tangible employment action, thereby warranting reversal of the decision below.

B. This Court's Application Of The Affirmative Defense In *Ellerth* Strongly Supports A Finding Of No Liability Where The Employee Did Not Complain About Harassment Prior To Quitting

In fact, this Court's choice not to include constructive discharge when describing examples of tangible employment actions in *Ellerth* strongly supports a finding of no liability where an employer had effective mechanisms in place to

prevent harassment, but the employee unreasonably failed to take advantage of them. *Ellerth* itself was a constructive discharge case. The district court dismissed Ellerth's constructive discharge claim because it said she "consciously chose not to use Burlington's grievance procedure" without any evidence that her employer would have ignored her complaint. *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101, 1124 (N.D. Ill.), *rev'd*, 123 F.3d 490 (7th Cir. 1996), *aff'd*, 524 U.S. 742 (1998). The court reasoned that "[p]lainly, when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment." *Id.*

The case thus presented this Court with the opportunity to treat a constructive discharge as a tangible employment action. 524 U.S. at 761. Yet, in describing the tangible employment actions that Ellerth possibly could raise, this Court identified only a denial of a raise or a promotion, and not a constructive discharge. *Id.* The Court's decision to exclude her constructive discharge claim therefore supports the conclusion that such a claim is unavailable when an employee has an effective grievance procedure accessible to her, but decides not to use it without any evidence that her complaint would be futile. *See* Sara Kagay, *Note: Applying the Ellerth Defense to Constructive Discharge: An Affirmative Answer*, 85 Iowa L. Rev. 1035, 1057-58 (Mar. 2000). In fact, this Court specifically noted that "Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor]." *Ellerth*, 524 U.S. at 766.

Other courts likewise have refused to make employers strictly liable for workplace harassment based on this Court's decision to exclude constructive discharge when describing tangible employment actions, despite its awareness of Ellerth's claim. *See, e.g., Caridad*, 191 F.3d at 295; *Powell v. Morris*, 37 F. Supp.2d 1011, 1019 (S.D. Ohio 1999).

C. A Constructive Discharge Cannot Exist Where An Employer Has A Well-Communicated Antiharassment Policy, Timely Investigates Grievances, And Takes Appropriate Action In Response

An employee who unreasonably fails to follow her employer's internal grievance procedure for reporting sexual harassment or to acknowledge that her employer has resolved the situation before quitting cannot establish a constructive discharge claim. To establish a constructive discharge, a plaintiff must show "that [her] working conditions were 'so intolerable that a reasonable person in her position would have been compelled to resign.'" *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997) (citations omitted). In a work environment that includes a well-communicated antiharassment policy, a simple complaint procedure that is readily accessible to employees, and prompt, effective relief to remedy harassment, a reasonable person would not feel forced to resign.

In other words, the availability of a complaint procedure that satisfies the affirmative defense also effectively precludes a constructive discharge claim, because it provides a reasonable alternative to resignation. An employee who rejects that alternative in favor of quitting is not acting reasonably. The Eleventh Circuit held in *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752 (11th Cir. 1996), that three employees could not establish a constructive discharge claim where they did not give their employer enough time to remedy the situation before they quit. *Id.* at 754. Likewise, the Eighth Circuit has held that "[i]f an employee quits without giving her employer a reasonable chance to work out a problem, then she has not been constructively discharged." *Howard v. Burns Bros.*, 149 F.3d 835, 842 (8th Cir. 1998) (citation and internal quotation omitted). Moreover, management's swift action to investi-

gate and promptly resolve a complaint of harassment significantly undercuts an employee's claim that she was forced to leave. *Lee-Crespo v. Schering-Plough Del Caribe, Inc.*, __ F.3d. __, 2003 WL 23095261, at *9 (1st Cir. Dec. 31, 2003).

Suders's failure promptly to complain about harassment thus bars her constructive discharge claim as a matter of law.

D. A Constructive Discharge Claim Simply Duplicates The Affirmative Defense Analysis, Only Under A Different Name

Those courts that have concluded that a constructive discharge could constitute a tangible employment action have focused on the reasonableness of the employee's actions in resigning and the employer's response once it found out about the harassment. By employing the same analysis as the affirmative defense, only under a different name, these courts have proven that the elements of a constructive discharge and an *Ellerth* defense are duplicative. In *Jackson v. Arkansas Department of Education*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002), for example, the Eighth Circuit summarily ruled that a proven constructive discharge would constitute a tangible employment action that would prevent the employer from raising the affirmative defense. This ruling is unhelpful, however, because the court was silent on its rationale.

Nevertheless, the *Jackson* court's incorporation of the affirmative defense into the plaintiff's constructive discharge claim is instructive. The court ultimately rejected the plaintiff's constructive discharge claim after concluding she had unreasonably failed to notify her employer about the harassment until nine months after it had started, thereby depriving it of the opportunity to correct the alleged problem. *Id.* at 1027. In addition, the court found Jackson's employer had responded reasonably to her eventual complaint by separating the two workers, reimbursing the plaintiff for sick

leave she had taken because of the harassment, following up to see if she had any further problems, and ultimately firing her harasser. *Id.*

By conflating the requirements for the affirmative defense and a constructive discharge claim, the Eighth Circuit showed that the constructive discharge analysis actually is duplicative in harassment cases in which an employer has effective antiharassment policies and procedures in place, and the employee fails to complain promptly about harassment. In that case, the employee has not acted reasonably, and therefore cannot establish a viable constructive discharge claim. At the same time, the employer can rely on the affirmative defense by showing it acted reasonably to prevent and promptly correct the harassment, and that the employee unreasonably failed to complain. *See Ellerth*, 524 U.S. at 765. In contrast, an employer that lacks such policies would be liable for harassment, since it could neither prove its affirmative defense nor refute a constructive discharge claim. Thus, the same evidence that bears on the merits of the employee's constructive discharge claim will determine whether the employer may use the affirmative defense. Yet, requiring this dual analysis to reach the same outcome makes no sense.

One commentator complained about the unnecessary confusion a constructive discharge claim creates in harassment cases:

> Rather than attempting to bolster the reasonableness elements required in constructive discharge to assure that a plaintiff does not evade the Ellerth defense standards, courts should just apply that defense in appropriate cases. Where the case is a traditional hostile work environment case with the addition of a plaintiff's resignation, an employer should be able to assert a defense. . . . Allowing the employer to assert an affirmative defense would lead to more consistent, uniform

> standards. Both employers and employees would have a better idea of what is required, and constructive discharge would fit more neatly into the employment scheme the Court created in Ellerth and Faragher.

Kagay, at 1061. After all, the need to develop "a uniform and predictable standard" of an employer's vicarious liability for a supervisor's harassment initially motivated this Court to articulate the affirmative defense in *Ellerth*. 524 U.S. at 754.

By unnecessarily forcing a court to evaluate the same evidence twice, the Third and Eighth Circuit's treatment of a constructive discharge as a tangible employment action, which if proved, would preclude the employer's affirmative defense must be reversed.

II. REVERSING THE THIRD CIRCUIT'S DECISION WILL FURTHER THE IMPORTANT PUBLIC POLICY THIS COURT ARTICULATED IN *ELLERTH* AND *FARAGHER* OF PREVENTING HARASSMENT BY MOTIVATING EMPLOYERS TO DEVELOP EFFECTIVE ANTIHARASSMENT POLICIES AND GRIEVANCE PROCEDURES, AND EMPLOYEES TO COMPLAIN PROMPTLY

A. The Affirmative Defense Is Critical To Furthering Title VII's Primary Purpose Of Preventing Discrimination

1. By prohibiting sexual harassment that exceeds a certain threshold, Title VII encourages early detection and remedies

Title VII, by prohibiting sexual harassment that exceeds a certain threshold of severity, creates a strong incentive to employers to detect and respond to potential problems early, before they escalate to the level of unlawful conduct. 42 U.S.C. § 2000e-2. This Court described the primary objective of Title VII and the remedies available under it as

encouraging employers "to self-examine and to self-evaluate their employment practices" in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Although this Court interpreted Title VII to prohibit sexual harassment as a form of sex discrimination in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), it explicitly refused to hold employers always automatically liable for sexual harassment by their supervisors. *Id.* at 72. Instead, the Court said agency principles should guide employers' liability for their supervisors' actions. *Id.*

Nor did the *Meritor* court conclude that all offensive behavior in the workplace is unlawful. Instead, the Court established a threshold as to the degree of harassment that constitutes unlawful discrimination. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (citation omitted). In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court reaffirmed that not all offensive conduct is actionable. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview." *Id.* at 21. By holding employers liable under Title VII only when harassing behavior surpasses a certain threshold, this Court gave employers an incentive to detect and respond to harassing conduct early on before it reaches that level.

2. This Court's recognition of an affirmative defense to sexual harassment claims under certain circumstances promotes Title VII's goal of preventing discrimination

Court decisions that have reduced or eliminated an employer's liability for harassment based on its internal efforts to detect and respond to harassment have furthered Title VII's goal of preventing discrimination by encouraging

employers to develop well-communicated, express policies banning sexual harassment in the workplace and to respond promptly to harassment complaints. In particular, this Court's recognition of an affirmative defense to a harassment claim involving a supervisor under certain circumstances in *Ellerth* and *Faragher* exemplifies this incentive. In *Ellerth*, the Court described how the affirmative defense accomplishes Title VII's "'primary objective'" of avoiding harm, *Faragher*, 524 U.S. at 806, by encouraging employers to develop, and individuals to use, effective complaint procedures.

> Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose. As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.

Ellerth, 524 U.S. at 764 (citations omitted).

This Court went on to explain in *Faragher* that holding an individual to a reasonable care standard stems from the general theory of damages, which requires a victim to use reasonable means to avoid or minimize harm. The underlying premise of the affirmative defense is that an employer should not be responsible for harm the individual could have avoided, once given the means to do so. "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages

could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." 524 U.S. at 807.[2]

B. Allowing A Constructive Discharge Claim To Preclude The Affirmative Defense Will Undermine Employer Efforts To Create Effective Internal Antiharassment Policies And Procedures

1. Employers have responded to the incentive created by the affirmative defense by developing effective antiharassment policies and procedures

The Court's projection in *Ellerth* and *Faragher* that rejecting strict liability for employers under Title VII for workplace harassment would encourage employers to develop effective procedures to detect and respond to workplace harassment has proven true. A 2001 workplace survey of over 200 human resource executives conducted by a national law firm found that 82% of the respondents provided sexual harassment prevention training for their supervisors, a sharp increase from the 34% that provided this type of training in 1995. The rise in training corresponds to a significant decline in the number of sexual harassment complaints being filed in the workplace. Sixty percent of the respondents reported handling an internal sexual harassment complaint in the past year, down from 92% of the respondents in 1995. Most of the respondents worked for companies with over 100 employees. *See* 2001 Jackson Lewis Annual Workplace

[2] Several courts of appeals have upheld the availability of the affirmative defense based on the unreasonableness of the employee's inaction in response to the alleged harassment. *See, e.g., Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1301-02 (11th Cir. 2000).

Issues Survey, *available at* http://www.jacksonlewis.com/publications/surveys/workplace/ 2001/default.htm.

A separate poll of 232 human resources managers in 2000 found that 97% of the companies represented had a formal policy against sexual harassment. Moreover, these companies were continually striving to improve their policies. Of them, 83% had updated their policy within the last two years, one third having revised the policy within the last six months. 75% of the companies had updated their procedures on reporting and investigating sexual harassment complaints within the past two years. Almost 30% of the companies had made such revisions within the last 6 months. In addition, 74% of the companies provided sexual harassment training for their employees, who spent an average of 3-4 hours per year attending this type of training. Institute of Management and Administration (IOMA), "Sexual Harassment Survey: Vital Statistics," *Human Resource Department Management Report* (Jan. 2002).

The experiences of EEAC's members also demonstrate the value of the affirmative defense in preventing harassment. These companies are committed to maintaining workplaces that are free from discrimination, including sexual harassment. They long ago recognized that workplace discrimination, including sexual harassment, not only is against the law, but also is bad business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with the company. The existence of the affirmative defense acknowledges these concerns.

Accordingly, U.S. companies such as EEAC's members have expended substantial resources and significant efforts to combat workplace sexual harassment. They have adopted policies expressing their commitment to the right of all employees to be free from sexual harassment in the workplace and categorically forbidding supervisors and employees from engaging in sexually harassing conduct. They have

communicated those policies to all employees at new employee orientation and other appropriate opportunities. They have publicized those policies in employee manuals and hand-delivered and posted notices. They have conducted frequent and repeated seminars, training sessions, and briefings to teach supervisors and employees to recognize and halt harassment in the workplace.

In addition, these companies have implemented formal antiharassment procedures that encourage witnesses as well as victims to report sexual harassment to management. These procedures call for rapid, thorough investigation and prompt, effective remedial action where warranted, including discipline and, where appropriate, discharge of offenders. Moreover, these companies have taken steps to ensure that these procedures are accessible to employees and that employees are aware of both their purpose and their effect.

The success of companies' efforts to reduce workplace harassment is evident. Since the 1998 *Ellerth* and *Faragher* decisions, the number of discrimination charges alleging sexual harassment that have been filed with the Equal Employment Opportunity Commission (EEOC) or state and local fair employment practices agencies has declined almost 10%. According to the EEOC, the number of Title VII charges alleging sexual harassment dropped from a 10-year high of 15,889 in fiscal year 1997, to 14,396 in fiscal year 2002.[3] These figures thus demonstrate the effectiveness of the affirmative defense in furthering Title VII's goal of preventing discrimination.

[3] *See* Equal Employment Opportunity Commission, "Sexual Harassment Charges EEOC and FEPAs Combined: FY 1992 – FY 2002," *available on the EEOC's web site at* http://www.eeoc. gov/stats/harass.html.

2. The decision below jeopardizes continued employer efforts to prevent discrimination

Allowing employees to proceed with constructive discharge claims, even though their employers had effective antiharassment policies and grievance procedures in place to deal with harassment complaints, would undermine seriously the incentive the affirmative defense provides for employers to create internal mechanisms to address sexual harassment. The decision below would jeopardize the very existence and growth of these important antiharassment policies and procedures by diminishing their practical value in helping a company defend against a harassment claim. Allowing employees to make their employers strictly liable for harassment by simply quitting without reporting the harassment or single-handedly rejecting an effective resolution would make having a complaint procedure and remedial policy pointless. "[I]f an employee could convert a hostile work environment claim into a constructive discharge claim simply by resigning without first seeking redress from the employer, then the *Ellerth* defense would ring hollow." *Scott v. Ameritex Yarn*, 72 F. Supp.2d 587, 595 (D.S.C. 1999); *see also EEOC v. Barton Protective Servs., Inc.*, 47 F. Supp.2d 57, 60 (D.D.C. 1999) ("[a]ssigning the labels of 'constructive discharge' and 'tangible employment action' to [plaintiff's resignation] . . . would make nonsense of the *Burlington* affirmative defense").

This prospect is particularly troubling because quitting robs the employer of the opportunity to address the harassment, which further undercuts Title VII's goal of avoiding discrimination. By quitting, a victim of harassment knowingly allows the harasser to continue behaving objectionably. In essence, the decision below "would allow a constructive-discharge claiming employee to procedurally bypass her employer's grievance procedure and deprive it of the *Ellerth/Faragher* affirmative defense. That would simply

moot the employer's preventive and corrective efforts, and gut *Ellerth/Faragher*'s goal of encouraging sensible grievance procedures." *Jones v. USA Petroleum Corp.*, 20 F. Supp.2d 1379, 1384 (S.D. Ga. 1998).

The Third Circuit's decision thus significantly reduces the incentive for employers to develop effective complaint procedures. The knowledge that even the most effective complaint procedure will not protect them from liability if an employee suddenly quits instead of alerting management to harassment significantly lessens the benefit of developing such procedures. In the end, employees would control when, if ever, the affirmative defense would be available to their employers. Treating quitting as a tangible employment action would represent a return to strict employer liability for workplace harassment, a result this Court explicitly rejected in *Faragher* and *Ellerth*.

The law thus supports holding employers strictly liable for sexual harassment under Title VII only when a subordinate suffers a tangible employment action at the hands of his or her harassing supervisor because of a gender bias. Imposing liability only under these circumstances will continue to encourage employers to detect and remedy situations before they reach this level, which promotes Title VII's goal of preventing harassment.

C. To Base An Employer's Vicarious Liability For Harassment On An Aggrieved Individual's Unpredictable Personal Response To Certain Conduct Would Be Unfair

Employers cannot even predict, much less control, how a particular individual will respond to behavior he or she encounters. To make employer liability depend on this type of uncertainty, rather than actions taken by supervisors that are within its control, would be unfair.

Allowing a plaintiff to control when her employer would be strictly liable for harassment would be an anomaly. In rejecting a plaintiff's voluntary request for a transfer to distance herself from her harasser as a tangible employment action, the court in *Sconce v. Tandy Corp.*, 9 F. Supp.2d 773 (W.D. Ky. 1998), explained that it

> [could] not find any authority or logic which supports such a concept that a self-imposed job detriment should support strict liability. . . . If a plaintiff can refuse the sexual advances and then self-impose a job detriment, the circumstances stray quite far from anyone's ability to connect that detriment to the employer as a matter of strict liability. The degree of the *supervisor's* conduct determines the employer's liability.

Id. at 776.

Applying the same reasoning, the court in *Dunegan v. City of Council Grove, Kansas Water Department*, 77 F. Supp.2d 1192 (D. Kan. 1999), also refused to let the plaintiff control when the affirmative defense was available. In that case, the court held the plaintiff's unilateral decision to take time off after she complained about harassing conduct in the workplace did not constitute a tangible employment action. *Id.* at 1199-1200. Her decision did not refer to "significant changes in employment status . . . in which the alleged harasser *directly* fired, demoted or reassigned the victim of harassment . . . ." *Id.* at 1200 (emphasis added).

Likewise, an employee's personal reaction to alleged harassment and decision to apply for long term disability benefits should not deprive her employer of the chance to raise the affirmative defense. In *Desmarteau v. City of Wichita*, 64 F. Supp.2d 1067 (D. Kan. 1999), the court rejected disability retirement as a tangible employment action under *Ellerth* and *Faragher*. The plaintiff claimed she was forced to retire because her supervisor's harassment caused her severe emotional distress. The court, however, said this

Court's "focus on the tangible actions of the supervisor would logically exclude actions which are only 'constructively' attributed to [her supervisor], and would exclude employment consequences arising from a plaintiff's particular reaction to a hostile working environment." *Id.* at 1079. Giving employees virtually complete control over employer liability for sexual harassment would render even the most comprehensive and effective antiharassment policy and grievance procedure irrelevant, a result that surely frustrates Title VII.

D. The Decision Below Would Severely Prejudice Employers By Subjecting Them To Significantly More Discrimination Claims And Weakening Their Defense

The Third Circuit's decision significantly increases the pool of potential claimants who may seek to hold their employers strictly liable for workplace harassment, and thus the number of claims to which employers must respond. On average, over 1.8 million workers in the United States quit their private sector jobs *each month* in 2003.[4] This figure does not even include the farming industry, which traditionally has a higher turnover rate. *Id.*

The decision below makes each ostensibly voluntary separation a potential subject of a discrimination charge and/or lawsuit that may result in automatic liability for the employer. Each time an employee quits, he or she subsequently may claim that the resignation really was a constructive discharge. Under the decision below, linking the resignation to some harassment by a supervisor may completely preclude the employer from relying on the affirmative defense, thereby allowing the former employee to

[4] Employment Policy Foundation tabulation of Bureau of Labor Statistics data from the Job Openings and Labor Turnover Survey (2003) (data *available at* http://data.bls.gov/labjava/outside.jsp?survey=jt).

recover up to $300,000 in compensatory and punitive damages for a successful claim. 42 U.S.C. § 1981a. Unless this Court reverses the decision below, employers will be forced to defend against significantly more harassment complaints seeking to impose strict liability. While these employers ultimately may succeed in refuting the constructive discharge claim, they still must undergo a lengthy and expensive process to defend against each discrimination charge.

The prospect that employees who quit their jobs will try to hold employers strictly liable for workplace harassment also leaves employers with a difficult choice to make. Employers may want to investigate the working conditions of some or all workers who quit to determine whether harassment forced the person to resign to gauge their vulnerability to a finding of strict liability. The fixed budgets on which many human resources departments operate, however, means that these investigations likely will draw resources away from other programs that attempt to reduce the occurrence of harassment. This shift, however, may weaken an employer's ability to prove the affirmative defense, should it be available. This Court must reverse the decision below to avoid subjecting employers to an increased number of harassment claims while curtailing their ability to defend against them.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

PENNSYLVANIA STATE POLICE, PETITIONER

v.

NANCY DREW SUDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer may assert the affirmative defense to vicarious liability recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), when a plaintiff-employee shows that a hostile work environment created by a supervisor culminated in a constructive discharge.

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1 Barbara Linderman & Paul Grossman, *Employment Discrimination Law* (3d ed. 1997) 14
EEOC, *No. N-915-050, Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) <http://www.eeoc.gov/policy/docs/currentissues.html> 13, 15
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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

The question presented in this case is whether an employer may assert the affirmative defense recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), when the plaintiff in a Title VII action shows that a hostile work environment created by a supervisor culminated in a constructive discharge. The United States has a substantial interest in the resolution of that question, and participated as an amicus in both *Ellerth* and *Faragher*. The Attorney General is responsible for enforcing Title VII with respect to public employers. 42 U.S.C. 2000e-5(f)(1). The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title VII with respect to private employers. And, as an employer, the United States has

an interest in ensuring the fair and balanced enforcement of Title VII. The United States takes the position that the affirmative defense recognized in *Ellerth* and *Faragher* is available in a case alleging a constructive discharge, unless the constructive discharge was triggered in significant part by an "official act" of the employer.

STATEMENT

Respondent Nancy Suders filed suit against petitioner Pennsylvania State Police alleging, *inter alia*, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The district court granted petitioner's motion for summary judgment, but the court of appeals reversed. Because the case was resolved on petitioner's motion for summary judgment, the record must be viewed in the light most favorable to respondent. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). When viewed in that light, the summary judgment record establishes the following:

1. In March 1998, petitioner hired respondent as a police communications officer for the McConnellsburg barracks. Pet. App. 5a-6a. Respondent's supervisors were Sergeant Eric Easton, Station Commander at the McConnellsburg barracks, Patrol Corporal William Baker, and Corporal Eric Prendergast. *Id.* at 6a. Those three supervisors subjected respondent to a continuous pattern of sexual harassment that ceased only when she resigned from the force. *Ibid.*

Every time respondent went into Sergeant Easton's office, "he would bring up [the subject of] people having sex with animals." Pet. App. 6a-7a. Easton also stated, in respondent's presence, that "if someone had a

daughter, they should teach her how to give a good blow job[.]" *Id.* at 7a. And Easton would sit down in a chair near respondent, wearing spandex shorts, and spread his legs apart. *Ibid.* Corporal Baker repeatedly made obscene gestures in respondent's presence. *Id.* at 8a. He would "cross his hands, grab hold of his private parts and yell, suck it." *Ibid.* He would also rub his rear end in front of respondent and say "I have a nice ass, don't I?" *Id.* at 9a. Corporal Prendergast told respondent that "the village idiot could do her job." *Ibid.* He would wear black gloves and pound on the table to intimidate her. *Ibid.*

In June 1998, Prendergast accused respondent of taking a missing accident report home with her. Pet. App. 10a. After that incident, respondent approached petitioner's Equal Employment Opportunity Officer, Virginia Smith-Elliot, and told her she might need help, but neither respondent nor Smith-Elliot followed up on the matter. *Ibid.* On August 18, 1998, respondent contacted Smith-Elliot again, telling her that she was being harassed and was afraid. *Id.* at 11a. Smith-Elliot told respondent to file a complaint, without telling respondent where to obtain the form, and respondent perceived Smith-Elliot's manner as insensitive and unhelpful. *Ibid.*

Two days later, respondent's supervisors arrested her for theft, and respondent resigned from the force. Pet. App. 11a-12a. The background to that incident is as follows: Pursuant to a job requirement, respondent had taken on several occasions an exam testing her computer skills. *Id.* at 11a. Each time, respondent's supervisors told her that she had failed. *Ibid.* When respondent discovered her exams in a set of drawers in the women's locker room, she concluded that her supervisors had never sent them out to be graded and

that they had lied to her about having failed the exams. *Ibid.* Respondent's supervisors ultimately discovered that the exams were missing, and that prompted them to devise a scheme to arrest respondent for stealing the exams. *Id.* at 11a-12a. The officers dusted the drawers where the exams had been stored with a theft detection powder that turns a person's hands blue when the powder is touched. *Id.* at 12a. When respondent returned the papers to the locker room drawers where she had found them, her hands turned blue. *Ibid.* Respondent's supervisors then apprehended her, handcuffed her, photographed her, and questioned her. *Ibid.*

Respondent had previously prepared a written resignation. Pet. App. 12a. After respondent's supervisors detained her, she gave them her letter of resignation and attempted to leave. *Ibid.* The officers initially refused to permit her to leave and instead brought her to an interrogation room where she was given *Miranda* warnings and questioned further. *Ibid.* When respondent again voiced her intent to resign, she was permitted to leave. *Ibid.*

2. Respondent filed suit against petitioner alleging, *inter alia*, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII. Pet. App. 12a-13a. The district court granted petitioner's motion for summary judgment. *Id.* at 62a-82a.[1]

[1] Respondent also alleged that petitioner subjected her to discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951 *et seq.* (West 2000). Pet. App. 12a-13a. The district court dismissed those claims on sovereign immunity grounds, *id.* at 72a-74a, and those claims are not at issue here. The district court also dismissed respondent's claims against her three supervisors and Smith-Elliot, *id.* at 70a-72a, and those claims are not at issue here.

The district court held that respondent had presented sufficient evidence to permit a trier of fact to find that respondent's supervisors had created an actionable hostile work environment. Pet. App. 74a-77a. The court ruled, however, that petitioner was not vicariously liable for that harassment. The court noted that, under *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), in the absence of a tangible employment action, an employer may assert as a defense to a sexual harassment claim that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Pet. App. 77a (quoting *Faragher*, 524 U.S. at 807-808). The district court concluded that petitioner had established that defense as a matter of law. *Id.* at 78a-80a. The district court did not address respondent's constructive discharge claim.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-61a. Like the district court, the court of appeals concluded that respondent had presented sufficient evidence to permit a reasonable trier of fact to conclude that respondent's supervisors had engaged in "a pattern of sexual harassment that was pervasive and regular." *Id.* at 19a. However, the court disagreed with the district court in two respects. First, the court of appeals held that there were genuine issues of fact on whether petitioner had satisfied the elements of the affirmative defense recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S.

742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998). Pet. App. 20a. Second, the court of appeals held that the district court erroneously failed to consider respondent's constructive discharge claim and whether that claim would affect the availability of the affirmative defense. *Ibid.*

Addressing those issues, the court of appeals first held that a plaintiff alleging constructive discharge must show that "(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign * * * and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances." Pet. App. 25a. The court concluded that, in deciding the second issue, "it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning," but that "a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign." *Ibid.* Applying those standards, the court of appeals held that the evidence permitted a reasonable fact-finder to conclude that respondent had been constructively discharged. *Id.* at 26a.

The court of appeals then held that a constructive discharge always constitutes the kind of "tangible employment action" that renders the employer strictly liable and precludes the assertion of the *Ellerth/Faragher* affirmative defense. Pet. App. 28a. The court reasoned that a constructive discharge is "the functional equivalent of an actual termination," and that it has, "in most critical respects, the primary attributes of a tangible employment action, as defined in *Ellerth*

and *Faragher*." *Id.* at 54a. The court explained that "a constructive discharge 'constitutes a significant change in employment status,' by ending the employer-employee relationship," and it "inflicts the same type of 'direct economic harm.'" *Ibid.* (quoting *Ellerth*, 524 U.S. at 761, 762). The court also expressed concern that "removing constructive discharge from the category of tangible employment actions could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment." *Id.* at 55a.

The court of appeals "reject[ed] any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action." Pet. App. 52a. The court concluded that "when a supervisor creates a hostile work environment so severe that an employee has no alternative but to resign, the official power of the enterprise is brought to bear on the constructive discharge." *Ibid.* The court also concluded that "because a constructive discharge will necessarily involve the termination of an employment relationship, the employer will be on notice and have the opportunity to determine the cause of the separation from employment." *Id.* at 53a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a constructive discharge is always the kind of tangible employment action that triggers strict liability. Unless a constructive discharge is effected through a supervisor's official act, the employer may avoid vicarious liability by establishing the elements of the defense recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998).

A. When based on one of Title VII's prohibited characteristics, a "constructive discharge" violates Title VII. Title VII forbids an employer from discharging an employee on a prohibited basis, and an employer may not achieve that result indirectly by creating conditions that force an employee to resign. To establish a constructive discharge, a plaintiff-employee must show that discriminatory conditions were so intolerable that they would have compelled a reasonable employee to resign.

B. In deciding whether conditions would have compelled a reasonable employee to resign, it is relevant whether an employer has exercised reasonable care to prevent and correct discrimination and whether the plaintiff-employee unreasonably failed to take advantage of the preventive and corrective opportunities offered by the employer. Indeed, it may be that if an employer establishes the elements of the *Ellerth/Faragher* affirmative defense, it would preclude the plaintiff from being able to show that a reasonable person would have felt compelled to resign. Conversely, if an employee carries the burden of establishing that she was constructively discharged, including that she did not unreasonably fail to take advantage of the employer's preventive and corrective opportunities, it is not clear how the employer would be able to carry its burden of establishing the *Ellerth/Faragher* affirmative defense. This case, however, proceeds on the assumption that there are cases in which a plaintiff can meet the "compelled to resign" standard even when the employer has established the elements of the *Ellerth/Faragher* defense, and the question is whether, in such cases, the employer may avoid vicarious liability.

C. *Ellerth* provides the framework for resolving that issue. It holds that an employer is strictly liable for a

supervisor's discriminatory conduct and may not assert the *Ellerth/Faragher* affirmative defense when the supervisor takes a "tangible employment action" against a subordinate. 524 U.S. at 760. It further holds that a tangible employment action "requires an official act of the enterprise, a company act." *Id.* at 762.

D. Under *Ellerth*, a constructive discharge triggers strict liability only when it results from a supervisor's official act, such as a humiliating demotion or an extreme cut-in-pay. The court of appeals' view that strict liability is warranted even when a constructive discharge has resulted from a supervisor's unofficial workplace harassment is inconsistent with *Ellerth*'s holding that a tangible employment action *requires* an official act.

Ellerth explains why such a showing is a necessary prerequisite for strict liability. First, *Ellerth* implemented the common law principle that an employer is liable for the acts of its agents when the agent was aided by the agency relationship, and the existence of an official act ensures that the supervisor's misconduct was aided by the agency relationship. Absent an official act, the extent to which a supervisor has been aided by the agency relationship is much less clear. Second, because official acts are in most cases documented in official records and subject to higher-level review, they are the acts employers can most easily control. An employer has far less ability to control a supervisor's workplace harassment when it is unaccompanied by an official act, and agency principles therefore do not support a rule of strict liability in such cases. An employee's decision to resign, in the absence of an official act, does nothing to enhance the degree of control over the supervisor's conduct. Accordingly, a constructive

discharge standing alone should not produce a categorical rule of strict liability.

E. Because the court of appeals held that a constructive discharge always triggers strict liability, it did not conduct a thorough analysis of whether respondent's alleged constructive discharge resulted in significant part from a supervisor's official act or acts. The case should therefore be remanded for a determination of that issue.

ARGUMENT

AN EMPLOYER IS STRICTLY LIABLE FOR A CONSTRUCTIVE DISCHARGE WHEN THE CONSTRUCTIVE DISCHARGE RESULTS FROM A SUPERVISOR'S OFFICIAL ACT

In *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), the Court established standards for determining when a supervisor's creation of a sexually hostile work environment renders the employer vicariously liable to the victim of that discrimination. The Court devised two different rules of vicarious liability that depend on whether the supervisor's sexual harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. First, if the supervisor's sexual harassment culminates in a tangible employment action, the employer is strictly liable. *Ibid.* Second, if the supervisor's sexual harassment does not culminate in a tangible employment action, the employer may avoid vicarious liability if it establishes an affirmative defense that consists of two necessary showings: (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff

employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

The courts of appeals have reached three different conclusions on whether a constructive discharge is the kind of "tangible employment action" that triggers strict vicarious liability and precludes the employer from asserting the *Ellerth/Faragher* affirmative defense. The Third Circuit and Eighth Circuits have held that a constructive discharge is *always* a tangible employment action. Pet. App. 28a; *Jaros* v. *Lodgenet Entm't Corp.*, 294 F.3d 960, 966 (8th Cir. 2002). The Second Circuit has held that a constructive discharge is *never* a tangible employment action. *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 294-295 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000). And the First and Seventh Circuits have held that a constructive discharge can be a tangible employment action, but only if it is caused by a supervisor's "official" act. *Reed* v. *MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003); *Robinson* v. *Sappington*, 351 F.3d 317, 336 (7th Cir. 2003).

The First and Seventh Circuits have adopted the correct view. A constructive discharge constitutes a "tangible employment action" within the meaning of *Ellerth* and *Faragher* when the constructive discharge results in whole or in significant part from a supervisor's official act or acts. Absent an official supervisory act, the employer may avoid vicarious liability for the constructive discharge and for the pattern of harassment that preceded it by proving the elements of the *Ellerth/Faragher* affirmative defense.

A. To Establish A Constructive Discharge, An Employee Must Show That A Reasonable Employee Would Have Felt Compelled To Resign

Resolution of the question presented is assisted by an understanding of the statutory basis for a constructive discharge claim and the elements for proving that claim. The starting point for the constructive discharge analysis is the text of Title VII. It forbids an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). That statutory text does not refer to a "constructive discharge." But Title VII's prohibition against a discriminatory "discharge" and its additional prohibition against discrimination in the "terms" and "conditions" of employment are both broad enough to render the employer liable for the creation of discriminatory working conditions that effectively force an employee to resign.

That reading of the statutory text reflects that Congress would not have intended to permit an employer to achieve indirectly what Title VII clearly prohibits the employer from achieving directly. Thus, just as an employer is liable under Title VII when it discharges an employee on the basis of sex, the employer is likewise liable when, because of the individual's sex, the employer creates conditions of employment that effectively force the employee to resign.

This Court has never had occasion to decide whether a plaintiff may assert a constructive discharge claim under Title VII. The courts of appeals, however, have uniformly held that a plaintiff may assert such a claim under Title VII, and they have agreed on a necessary

precondition for proving such a claim: To establish a constructive discharge, an employee must prove that conditions were so intolerable that a reasonable person would have felt compelled to resign.[2] The courts of appeals are divided on whether an employee must make an additional showing that the employer intended to cause the employee to resign.[3] But all courts agree that a plaintiff-employee must show not only that prohibited discrimination has occurred, but also that the discrimination was so intolerable that the employee had no reasonable alternative other than to resign. See note 2, *supra*.

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[2] See *Landrau-Romero* v. *Banco Popular De Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000); *Lopez* v. *S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3d Cir. 1984); *Matvia* v. *Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 272-273 (4th Cir. 2001); *Young* v. *Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975); *Ford* v. *General Motors Corp.*, 305 F.3d 545, 554 (6th Cir. 2002); *Drake* v. *Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 886 (7th Cir. 1998); *Jaros* v. *Lodgenet Entm't Corp.*, 294 F.3d 960, 965 (8th Cir. 2002); *Bergene* v. *Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1143-1144 (9th Cir. 2001); *Sanchez* v. *Denver Pub. Sch.*, 164 F.3d 527, 534 (10th Cir. 1998); *Fitz* v. *Pugmire Lincoln-Mercury, Inc.*, 348 F.3d 974, 977 (11th Cir. 2003); *Mungin* v. *Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997). The EEOC has adopted that same precondition. EEOC, *No. N-915-050, Policy Guidance on Current Issues of Sexual Harassment* para. 5 Constructive Discharge (Mar. 19, 1990) <http://www.eeoc.gov/policy/docs/currentissues.html>.

[3] See, *e.g.*, *Bourque* v. *Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980) (intent not required); *Whidbee* v. *Garzarelli Food Specialities, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000) (intent required); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887-888 (3d Cir. 1984) (specific intent not required, but conduct must have foreseeable result of causing employee to resign).

An employee who proves that a hostile work environment is so intolerable as to constitute a constructive discharge secures an important remedial advantage. In general, an employee who resigns in response to an employer's creation of a hostile work environment may only recover damages for the harm that occurred before the employee resigned. Such an employee may not ordinarily recover back pay for the wages lost following the employee's resignation. In contrast, when the work environment is so intolerable as to constitute a constructive discharge, the plaintiff would ordinarily be entitled to recover those post-resignation damages. See 1 Barbara Linderman & Paul Grossman, *Employment Discrimination Law* 838 (3d ed. 1997).

B. The Employee's Burden of Showing A Constructive Discharge And An Employer's Proof Of The Elements Of The *Ellerth/Faragher* Affirmative Defense Substantially Overlap

1. The courts of appeals have recognized that, independent of their relevance to the issue of vicarious liability, an employer's efforts to prevent and correct harassment and an employee's efforts to alert the employer to a supervisor's harassment are relevant in deciding whether a plaintiff has carried the burden of proving a constructive discharge. For example, the Eighth Circuit has held that "[a]n employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." *Tidwell* v. *Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (1996). Similarly, the Seventh Circuit has held that an employee's failure to complain about discriminatory working conditions "may show that the employee didn't really consider his working conditions intolerable or may deny the employer a reasonable opportunity

to correct the situation without facing a lawsuit." *Lindale* v. *Tokheim Corp.*, 145 F.3d 953, 955-956 (1998). See EEOC, *No. N-915-050, Policy Guidance on Current Issues of Sexual Harassment* para. 5 Constructive Discharge (Mar. 19, 1990) <http://www.eeoc.gov/policy/docs/currentissues. html>.

Two Eighth Circuit decisions illustrate that, without regard to the issue of vicarious liability, an employer's efforts to prevent and correct harassment and an employee's failure to alert an employer to supervisory harassment can have crucial significance in deciding whether a plaintiff has proven a constructive discharge. In *Jackson* v. *Arkansas Department of Education*, 272 F.3d 1020 (2001), cert. denied, 536 U.S. 908 (2002), the Eighth Circuit held (incorrectly, see pp. 21-26, *infra*) that a constructive discharge is always a tangible employment action and that, once it is shown, an employer is always strictly liable and may not assert the *Ellerth/Faragher* affirmative defense. 272 F.3d at 1026. The court nonetheless went on to hold in that very case that the plaintiff failed to establish that she was constructively discharged because she did not notify her employer until nine months after the harassment began and because she refused to participate in the employer's effort to correct the problem. *Id.* at 1027. In contrast, in *Jaros* v. *Lodgenet Entertainment Corp.*, 294 F.3d 960, 966 (2002), where the plaintiff complained about supervisory harassment and the employer did nothing in response to the complaint, the Eighth Circuit distinguished its prior decision in *Jackson* and sustained a jury's finding of a constructive discharge.

As those cases demonstrate, there is necessarily an overlap between the evidence that is relevant to prove a constructive discharge and the evidence that is relevant to establish the *Ellerth/Faragher* affirmative

defense to vicarious liability. The court of appeals recognized that very point in this case. The court stated:

> [I]t may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs. These are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*.

Pet. App. 58a.

2. There may, however, be more than an evidentiary overlap between the evidence that is relevant to a constructive discharge claim and the evidence that is relevant to the affirmative defense to vicarious liability for actionable harassment. If an employer makes the showings necessary to establish the *Ellerth/Faragher* affirmative defense, it is difficult to understand how an employee would be able to establish a constructive discharge in the first place. Specifically, if an employer has "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," *Ellerth*, 524 U.S. at 765, a plaintiff would not seem to be able to show that discriminatory conditions *compelled* him or her to resign. In that situation, the employer's corrective opportunities would appear to have provided a reasonable alternative to resigning.

Conversely, if an employee can show that the "preventive or corrective opportunities provided by the employer" (*Ellerth*, 524 U.S. at 764) were either flawed

or unavailing, such that they do not preclude a demonstration that the decision to resign, rather than pursue those opportunities, was reasonable, then it is unclear how an employer could carry its burden under the *Ellerth/Faragher* affirmative defense. If the employer cannot prevail when the burden rests on the employee, it is unclear how it will fare better when the burden shifts to the employer to prove the affirmative defense.

This case, however, does not raise the question of the precise relationship between the standard for proving a constructive discharge and the *Ellerth/Faragher* affirmative defense. Moreover, this Court has never addressed a constructive discharge theory of recovery, let alone definitively resolved the plaintiff's burden. If, for example, this Court finally fixed the plaintiff's burden in a constructive discharge case as including a showing that the employee either exhausted or "[r]easonably failed to take advantage of any preventive or corrective opportunities provided by the employer," *Ellerth*, 524 U.S. at 765, it is not clear what further role the affirmative defense could play in constructive discharge cases.

There may, however, be cases in which a plaintiff could satisfy the constructive discharge "compelled to resign" standard even when the employee has "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 765. The question presented is whether, in such cases, the employer may assert the *Ellerth/Faragher* affirmative defense to avoid vicarious liability for the constructive discharge and any pattern of harassment that preceded it.

C. *Ellerth* Guides The Resolution Of The Question Presented

This Court's decision in *Ellerth* provides substantial guidance in resolving that question. Title VII defines an "employer" to include its "agents." 42 U.S.C. 2000e(b). In *Ellerth*, the Court viewed that definition as an express direction "to interpret Title VII based on agency principles." 524 U.S. at 754. Following the Court's earlier decision in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), the *Ellerth* Court concluded that the discussion of agency principles in the Restatement (Second) of Agency (1957) provides a "useful beginning point" for implementing that direction. *Ellerth*, 524 U.S. at 755. The Court focused on the Restatement's specification that an employer is liable for the acts of its agents when the agent "was aided in accomplishing" the act "by the existence of the agency relation." *Id.* at 758 (quoting *Restatement*, *supra*, § 219(2)(d)).[4]

1. The *Ellerth* Court first rejected the view that an agent is aided by the agency relation merely because the existence of the employment relationship ensures proximity and contact with the victim. That view, the Court explained, would make the employer strictly liable for co-worker harassment notwithstanding the uniform understanding of the lower courts and the EEOC that an employer is liable for co-worker harassment only when the employer knew or should have

[4] The Court also noted that other agency principles might be relevant in certain contexts, including the principle that an employer is liable when its negligence is the cause of the agent's act, Restatement, *supra*, § 219(2)(b), and the principle that an employer is liable for the acts of agents committed within the scope of their employment, *id.* § 219(1). See 524 U.S. at 755-759. Neither of those principles is at issue here.

known about the harassment and failed to take corrective action. 524 U.S. at 760-761.

2. The Court then identified "a class of cases where, beyond question, more than the mere existence of the employment relationship aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760. The Court stated that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. The Court explained that "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-762.

The Court expressly contrasted tangible employment decisions from injuries that could be equally inflicted by a co-worker. For example, "[a] co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries," but "one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another." *Ellerth*, 524 U.S. at 762. In most cases, the Court continued, a tangible employment action "inflicts direct economic harm," and "[a]s a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury." *Ibid.*

The Court further elucidated that a tangible employment action "requires an official act of the enterprise, a company act." *Ellerth*, 524 U.S. at 762. Thus, "in most cases" a tangible employment decision "is documented in official company records, and may be subject to review by higher level supervisors," and "[t]he supervisor

often must obtain the imprimatur of the enterprise and use its internal processes." *Ibid.* For those reasons, the Court held, "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Ibid.*

3. The Court concluded that, when supervisory harassment does not culminate in a tangible employment action, it is less clear whether the harassment was aided by the agency relation. *Ellerth*, 524 U.S. at 763. "On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ibid.* "On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference." *Ibid.*

Because the aided-by-the-agency-relation principle does not furnish a clear answer to the question whether an employer is vicariously liable for supervisory acts that do not involve a tangible employment action, the Court turned to two other Title VII considerations to resolve that issue. First, the Court concluded that, if the standard of employer liability were made to depend in part on an employer's maintenance of effective anti-harassment policies, it would provide an incentive for the creation of such programs and "would effect Congress' intention to promote conciliation rather than litigation in the Title VII context." *Ellerth*, 524 U.S. at 764. Second, "[t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." *Ibid.* Accordingly, the Court held that when a supervisor's harassment does not culminate in a tangible employment action, an employer may defeat vicarious liability by establishing as an affirmative defense "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.

D. Under *Ellerth*, A Constructive Discharge Triggers Strict Liability When It Results From A Supervisor's Official Act

A constructive discharge can be effected through the actions of co-workers, the unofficial acts of supervisors, or the official acts of supervisors. Under the *Ellerth* analysis, only a constructive discharge effected in whole or in significant part through a supervisor's official act is the kind of "tangible employment action" that triggers strict liability and precludes the assertion of the *Ellerth/Faragher* affirmative defense.

1. The court of appeals' holding in this case that a constructive discharge is *always* a "tangible employment action" as that term is used in *Ellerth* suffers from at least two serious flaws. First, taken to its logical conclusion, it would mean that an employer would be strictly liable for a constructive discharge that results entirely from co-worker harassment. That result is impossible to reconcile with *Ellerth*'s holding that the aided-by-the-agency-relation principle cannot be stretched to encompass the activities of co-workers. 524 U.S. at 760.

More fundamentally, under *Ellerth*, a tangible employment action is an action that "requires an official act of the enterprise, a company act," 524 U.S. at 762,

and when a supervisor (and, a fortiori, a co-worker) effects a constructive discharge through ordinary workplace harassment, that requirement is not satisfied. For example, in this case, one of respondent's supervisors engaged in a repeated daily practice of grabbing his groin area and yelling, in respondent's presence, "suck it." See Pet. App. 8a. Even if a jury found that conduct sufficiently severe and pervasive to create a hostile work environment, and to cause a reasonable person to feel compelled to resign, it would not constitute an "official act of the enterprise" under *Ellerth*. 524 U.S. at 762. It is not conduct that depends on a grant of authority from the employer to the supervisor. It is not conduct that "only a supervisor" could have committed; a co-worker could have engaged in precisely the same objectionable conduct. *Ibid.* The practice would not "in most cases" be "documented in official company records" or be "subject to review by higher level supervisors." *Ibid.* And before undertaking it, a supervisor would not often "obtain the imprimatur of the enterprise" or "use its internal processes." *Ibid.* Under the Third Circuit's theory that a constructive discharge is always a tangible employment action, however, that conduct, when committed by a supervisor, could lead to strict liability and preclude the assertion of the affirmative defense.

The court of appeals "reject[ed] any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action." Pet. App. 52a. In the court's view, it is enough that a constructive discharge bears other indicia of a tangible employment action, such as working a significant change in employment status and inflicting economic injury. *Id.* at 54a. But under *Ellerth*, the existence of an official act is not something

that can be dispensed with as long as other indicia of a tangible employment action are present. Under *Ellerth*, a tangible employment action "*requires* an official act of the enterprise." 524 U.S. at 762 (emphasis added).

The considerations that underlie *Ellerth*'s distinction between tangible employment actions and other supervisory conduct demonstrate why an official act should remain a necessary prerequisite to strict liability. The existence of an official act, such as a demotion or a reduction in compensation, establishes "beyond question" that the supervisor has been aided by the agency relation in victimizing the employee. 524 U.S. at 760. Absent an official act, the extent to which the supervisor has been aided by the agency relation is less certain. *Id.* at 763. That uncertainty justifies permitting the employer to establish through the *Ellerth/Faragher* affirmative defense that it should not be held vicariously liable.

Moreover, because official acts "in most cases" are "documented in official company records, and may be subject to review by higher level supervisors," *Ellerth*, 524 U.S. at 762, they are the acts over which employers can exercise the most control. The employer's ability to control and prevent unlawful official action provides a crucial justification for holding an employer strictly liable for a supervisor's improper conduct even if the employer could otherwise show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765. When there is no official act, an employer's ability to control a supervisor's conduct and prevent a supervi-

sor's misconduct diminishes. In that event, failing to structure the rules of vicarious liability so as to provide an incentive for an employer to exercise reasonable care in preventing and correcting discrimination and for an employee to report discriminatory treatment cannot be squared with Title VII's goal of encouraging practices that will lead to the prevention and correction of discriminatory conduct without the need for litigation. *Id.* at 764.

2. The court of appeals' other justifications for holding that a constructive discharge always triggers strict liability are unpersuasive. The court's conclusion that a constructive discharge is always a tangible employment action because it is "the functional equivalent of an actual termination," see Pet. App. 54a, rests on an incorrect premise. A constructive discharge is functionally the same as an actual termination in some respects, but it is functionally different in ways that are directly relevant to the appropriateness of making the *Ellerth/Faragher* affirmative defense available. Both involve an end to the employment relationship. But in a constructive discharge, the employee ultimately decides that he or she has no alternative but to resign, whereas in an actual termination, the employer makes the ultimate decision to end the relationship. And, while an actual termination is *always* effected through an official act of the company, a constructive discharge may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. A constructive discharge involves both an employee's decision to leave and precipitating conduct. The former involves no official action, and the latter may or may not involve official action. Under *Ellerth*, those differences are critical for purposes of determining the correct vicarious liability principle.

The court of appeals' observation that the employee's resignation provides notice to the employer of the employee's departure does not alter the vicarious liability analysis. See Pet. App. 53a. Strict liability is triggered by an official act of the enterprise, not an official act of the employee. Moreover, unless the resignation has been precipitated by an adverse official act, or the employer has otherwise been alerted to the circumstances leading to the resignation, an employer would have no reason to view the resignation as anything other than one of the innumerable voluntary resignations that occur daily in this nation's workforce. The employer generally will have no reason to view a resignation as a constructive discharge until it is so characterized in a lawsuit months or years later. Agency principles provide no justification for requiring employers to devote the resources necessary to determine the circumstances underlying each and every voluntary resignation, particularly when the number of voluntary resignations that amount to constructive discharges is likely to be exceedingly small.

Finally, the Third Circuit's rule cannot be justified on the theory that an additional deterrent is needed to prevent employers from permitting hostile work environments to ripen into constructive discharges. See Pet. App. 55a. An employer that deliberately delays in correcting a hostile work environment would lose its ability to assert the *Ellerth/Faragher* affirmative defense, since that defense requires the employer to show that it "exercised reasonable care to prevent and correct *promptly* any sexually harassing behavior." *Ellerth*, 524 U.S. at 765 (emphasis added); *Faragher*, 524 U.S. at 807 (same). Such an employer would also risk greatly compounding the amount of damages for psychological injury it would owe to the employee. And

that kind of bad faith could also expose the employer to an award of punitive damages. See *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 545-546 (1999). Those potential consequences provide adequate incentives for an employer to eliminate a hostile work environment before it ripens into a constructive discharge. The court of appeals therefore erred in holding that a constructive discharge always triggers strict liability.

3. That does not mean that a constructive discharge is never a tangible employment action, as the Second Circuit held in *Caridad* v. *Metro-North Commuter Railroad*, 191 F.3d 283, 294-295 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000). Under *Ellerth*, a constructive discharge is a tangible employment action when it is effected through a supervisor's official act. For example, if a supervisor informed an employee performing important professional duties that he had demoted the professional to the position of janitor, and that caused a reasonable employee to resign, the constructive discharge would involve a tangible employment action under *Ellerth*. A demotion is one of the official acts specified in *Ellerth*. 524 U.S. at 765. Accordingly, under *Ellerth*, if the supervisor engaged in harassment that culminated in a demotion of the employee on a prohibited ground, the employer would be strictly liable for the difference in pay between the professional position and the janitorial position as well as any psychological harm caused by the demotion and the harassment that preceded it.

If essentially the same official act results in a constructive discharge, agency principles similarly justify holding the employer strictly liable for the resulting loss of wages. In such a case, the supervisor's ability to effect a constructive discharge is, "beyond question," aided by the supervisor's agency relation. *Ellerth*, 524

U.S. at 760. Absent the employer's delegation of authority to the supervisor to demote employees, the constructive discharge could not have occurred. And because of the employer's ability to oversee demotion decisions, it may take steps to prevent a supervisor from demoting an employee where that action would foreseeably make a reasonable employee feel compelled to resign.

4. The First and Seventh Circuit decisions provide good examples of how the "official act" standard operates in practice. In *Reed*, the plaintiff claimed a constructive discharge based on a supervisor's repeated sexual comments to her and an incident in which the supervisor sexually assaulted her. The First Circuit held that those acts did not preclude the employer from asserting the *Ellerth/Faragher* affirmative defense, explaining that the supervisor's conduct was "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." *Reed*, 333 F.3d at 33.

In contrast, in *Robinson*, after an employee complained that the judge she was working for had subjected her to sexual harassment, the presiding judge transferred her to another judge, told her that the transfer would make her life miserable for six months, and suggested that she resign. After resigning, the employee filed suit claiming constructive discharge, and plaintiff's employer asserted the *Ellerth/Faragher* affirmative defense. The Seventh Circuit held that since the presiding judge's action in transferring the plaintiff was an official act, the employer could not assert that defense to the employee's constructive discharge claim. *Robinson*, 351 F.3d at 337.

E. The Case Should Be Reversed And Remanded For A Determination Whether Respondent's Supervisors Committed An Official Act

Because the court of appeals in this case held that a constructive discharge is always a tangible employment action, it did not undertake a thorough analysis of whether any of the actions that allegedly precipitated respondent's constructive discharge was an official act. Much of the conduct that allegedly caused respondent to resign was unofficial. For example, Sergeant Easton's repeated statements about "people having sex with animals," Corporal Baker's inappropriate gestures and statements, and Corporal Prendergast's intimidating table-pounding were "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." *Reed*, 333 F.3d at 33.

On the other hand, the activities of respondent's supervisors in allegedly setting her up on a false charge of theft and engineering her arrest in order to force her to resign pose a more difficult question. The parties have not focused on evidence that would be relevant in resolving that issue, such as whether those activities depended on a grant of authority to supervise respondent in her employment or whether they could have been undertaken by any law enforcement officer, and whether that kind of activity is likely to be documented and subject to review by higher authority. The judgment of the court of appeals should therefore be reversed and the case should be remanded for a determination whether respondent's alleged constructive discharge resulted in significant part from an official act or acts.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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No. 03-95

IN THE

Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) files this brief *amicus curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-CIO is a federation of 64 national and international labor organizations with a total membership of approximately 13 million working men and women.

SUMMARY OF ARGUMENT

The affirmative defense delineated in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), is not available in a Title VII case where the plaintiff-employee proves that sexual harassment by her supervisor has culminated in the employee's constructive discharge.

I. In general terms, the *Ellerth/Faragher* affirmative defense is not available in cases where a supervisor's sexual harassment of a plaintiff-employee has culminated in a "tangible employment action." A "tangible employment action" is one which changes an employee's employment status in a way that inflicts economic injury, such as lost wages or benefits, as opposed to personal injury, such as pain and suffering or emotional distress.

The line drawn in *Ellerth* and *Faragher* accommodates the affirmative defense announced in those cases—which promotes the adoption and utilization of employer sexual harassment complaint procedures—with the general Title VII

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

principle that employees are not required to exhaust employer grievance procedures before bringing suit on discriminatory employment actions.

The "tangible employment action" limitation on the *Ellerth/Faragher* affirmative defense allows an employee who has suffered sexual harassment that culminates in a tangible employment action to join in a single Title VII lawsuit both her discriminatory employment action claim and her sexual harassment claim.

II. Constructive discharge is a "tangible employment action" within the meaning of the *Ellerth* and *Faragher* opinions. Constructive discharge is the functional equivalent of formal discharge in terms of the economic injury inflicted upon the employee. And, the Title VII law treats constructive discharge as the legal equivalent of formal discharge. Constructive discharge is, therefore, the sort of employment action that may be redressed by invoking Title VII's enforcement procedures without first exhausting employer grievance procedures.

ARGUMENT

The question here is whether a defendant-employer in a Title VII lawsuit can raise the affirmative defense delineated in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), where the plaintiff-employee proves that sexual harassment by her supervisor has culminated in the employee's constructive discharge.

We submit that just as—and for the same reasons—the *Ellerth/Faragher* affirmative defense is *not* available in suits on sexual harassment that culminates in a formal "discharge," *Ellerth*, 524 U.S. at 765, *Faragher*, 524 U.S. at 808, the *Ellerth/Faragher* affirmative defense is *not* available in suits on sexual harassment that culminates in a constructive discharge. The *Ellerth/Faragher* affirmative defense is not

available in suits on discriminatory "tangible employment actions"—*viz.*, in suits on employment actions that affect the plaintiff-employee's employment status in a way that causes her economic injury. And, like a discriminatory formal discharge, a discriminatory constructive discharge is a "tangible employment action."

I. (a) Under this Court's decisions in *Ellerth* and *Faragher*, "an employer may be held liable under Title VII of the Civil Rights Act of 1964 for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination." *Faragher*, 524 U.S. at 780 (citation omitted).

After carefully considering "the agency principles of vicarious liability for harm caused by misuse of supervisory authority," the Court concluded that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

While that conclusion sufficed under common law liability principles, the Court did not leave the matter at that point. Instead, in order to "accommodate the agency principles" with "Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees," the Court formulated a limited "affirmative defense" for Title VII hostile workplace cases. *Ellerth*, 524 U.S. at 764-765; *Faragher*, 524 U.S. at 807.

The "necessary elements" of this affirmative defense—which the defendant-employer is required to plead and prove—are: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective

opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

(b) Of pivotal importance here, the Court went on to specify that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

The critical operative term in delineating the scope of the affirmative defense is "tangible employment action." For Title VII purposes generally, a tangible employment action is one that inflicts "injuries of an economic character" that Title VII redresses by according the plaintiff-employee "make whole" relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 419 (1975). *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21(1993) (""economic" or "tangible" discrimination""). And, the term is obviously used in this sense in *Ellerth* and *Faragher*.

As the *Ellerth* Court put it, "a discriminatory act results in a tangible employment action" where "the plaintiff can show that she suffered an economic injury from her supervisor's actions." *Ellerth*, 524 U.S. at 760 (quotation marks and citation omitted). *Ellerth* expands on this point by listing examples whose common characteristic is that the employment action inflicts an economic injury on the employee: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. at 761. *Ellerth* then contrasts, as actions that are *not* tangible employment actions, "demotion without change in pay, benefits, duties, or prestige" and a "reassignment to [a] more inconvenient job," i.e., examples whose common characteristic is that the action does not inflict an economic injury. *Id.*

In other words, as *Faragher* adds, the affirmative defense is not available where the employee sues on "employment actions with tangible results." *Faragher*, 524 U.S. at 790.[2]

The availability of the *Ellerth/Faragher* affirmative defense, then, turns on whether the plaintiff-employee sues on an employment action that causes the employee economic injury or sues on an employment action that does *not* cause her economic injury but rather "other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages" for which "the pre-1991 version of Title VII provided no compensation," *Commissioner v. Schleier*, 515 U.S. 323, 335 (1995) (quotation marks and citation omitted).

(c) The *Ellerth* and *Faragher* opinions do not elaborate a rationale for drawing this line of demarcation or for setting this limit on the availability of the affirmative defense. But the logic of the Court's ruling is sufficient in itself to reveal the rationale. To borrow the Court's explanation of the basis

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[2] The Brief for the United States argues that "a tangible employment action" is "an official act of the enterprise, a company act" and defines "official act" as a formal exercise of supervisory authority of the sort that would be "documented in official company records" and carried out through "use [of the company's] internal processes." U.S. Br. 19-20, quoting *Ellerth*, 524 U.S. at 762. The *Ellerth* opinion offers a different definition of that term. *Ellerth* treats the term "official act" as synonymous with "company act," 524 U.S. at 762, and explains that the term "company acts" describes "acts that significantly alter the terms or conditions of employment," *id.* at 750, quoting *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 515 (7th Cir. 1997)(Posner, C.J., dissenting). By this definition, an "official" or "company" act is any act that "significantly alter[s] the terms or conditions of employment," i.e., an act that has economic consequences, regardless of whether it is effected through the enterprise's formal processes.

for the affirmative defense itself, the limit on its availability "accommodate[s]" the defense's promotion of employer grievance procedures to "Title VII's equally basic policy" of providing employees who are the victims of economically harmful employment discrimination direct, unconditional access to Title VII's remedial procedures. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

In its operative terms, the *Ellerth/Faragher* affirmative defense introduces into the Title VII enforcement scheme a wholly novel requirement that employees attempt to remedy certain forms of employment discrimination through employer complaint procedures before resorting to the statutory enforcement procedures. *Ellerth* and *Faragher* do so by providing that "proof that an employer had promulgated an antiharassment policy with complaint procedure" that was "suitable to the employment circumstances" will generally establish the first element of the affirmative defense. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. And, "showing an unreasonable failure to use any complaint procedure provided by the employer . . . will normally suffice to satisfy the employer's burden under the second element of the defense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-808.

Ellerth and *Faragher* introduce this exhaustion requirement against a background formed by the bedrock Title VII principle that an employee who has suffered a discriminatory tangible employment action, such as "a discharge, demotion, or undesirable reassignment," *Ellerth*, 524 U.S. at 765, *Faragher*, 524 U.S. at 808, has the right to invoke Title VII's statutory procedures for redress of that wrong without exhausting any employer complaint procedure. As this Court has stressed, "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). The primacy accorded

Title VII's remedial procedures is such that the period for filing Title VII charges on discriminatory "discharge[s], demotion[s], or undesirable reassignment[s]" will not even be tolled while an employee pursues an employer grievance procedure. *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-240 (1976).

"When a plaintiff proves that a tangible employment action resulted from . . . a supervisor's sexual [harassment], he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Ellerth*, 524 U.S. at 753-754. Where a supervisor's sexual harassment culminates in such a "discrete retaliatory or discriminatory act," the employee must initiate her Title VII action "within either 180 or 300 days of the date of the act or lose the ability recover for it." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). That being so, the *Ellerth/Faragher* affirmative defense is made unavailable in suits on sexual harassment culminating in tangible employment actions to assure that employees who suffer such employment discrimination—like all employees who suffer employment discrimination that inflicts economic injury—continue to have the right to seek Title VII redress free of any requirement to exhaust employer grievance procedures.

In this regard, *Ellerth* and *Faragher* provide that an employee who has suffered sexual harassment that culminates in a discriminatory tangible employment action has the right to bring suit on the tangible employment action and on the sexual harassment that preceded that action without first exhausting any employer sexual harassment grievance procedure. Nothing less would be sufficient to vindicate the employee right to such Title VII redress for the discriminatory tangible employment action, for the claim that the employment action was discriminatory and the claim that the action was preceded by and was the culmination of

supervisory sexual harassment are inextricably intertwined. Indeed, the sexual harassment preceding the tangible employment action will often constitute the principal evidence that the action was discriminatory. *See Ellerth*, 524 U.S. at 753-754. Since the parties will be in court on the culminating employment action and since the question of whether sexual harassment occurred will of necessity be litigated, *Ellerth* and *Faragher* contemplate a suit joining the claim on the sexual harassment and the claim on the culminating tangible employment action. *See Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 436-437 (1997).

II. Like a formal discharge, a constructive discharge is a "tangible employment action" within the meaning of *Ellerth* and *Faragher*.

(a). A formal discharge is self-evidently an employment action that makes an economically harmful change in the employee's employment status. Thus, an employee who suffers a discriminatory formal discharge has a direct, unconditional right to bring a Title VII suit on the discharge. And, for Title VII purposes, a formal discharge and a constructive discharge are functional equivalents.

"The general rule" under Title VII "is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee." *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975). It is beyond question that such a constructive discharge, like a formal discharge, makes an economically harmful change in the employee's employment status. And, that being so, a discriminatory constructive discharge is actionable under Title VII on the same basis as a discriminatory formal discharge. "Thus, just as an employer is liable under Title

VII when it discharges an employee on the basis of sex, the employer is likewise liable when, because of the individual's sex, the employer creates conditions of employment that effectively force the employee to resign." U.S. Br. 12.

It could not be otherwise. To take a particularly clear example, where an employer threatens an employee with discharge but offers her the chance to tender a resignation instead, the law does not treat the compelled resignation as any different than a discharge. And, if the employer compels the employee to resign under threat of discharge because of her sex, that compelled resignation is treated as an actionable wrong just as the formal discharge because of sex would have been.

In the instant case, the respondent, Nancy Drew Suders, alleges that her employer, the Pennsylvania State Police, compelled her resignation by taking her into police custody on baseless charges of theft from a workplace locker room. Pet. App. 12a. Surely, such a compelled resignation is the legal equivalent of a formal discharge.

Ms. Suders alleges, too, that her false arrest was the culmination of her supervisors' course of sexual harassment and that her constructive discharge was violative of Title VII and actionable as such. Such a discriminatory constructive discharge is the legal equivalent of a discriminatory formal discharge. *See Ellerth*, 524 U.S. at 753-754.

(b) In the instant case, the constructive discharge was caused by a discrete precipitating event, i.e., the allegedly false arrest. Even where there is not such a discrete precipitating event, e.g., where the constructive discharge has been caused by the hostile work environment created by supervisor sexual harassment, allowing the plaintiff-employee to join both her discriminatory constructive discharge claim and her hostile workplace claim is entirely compatible with

the *Ellerth/Faragher* "policies of encouraging forethought by employers and saving action by objecting employees." *Ellerth*, 524 U.S. at 764-765; *Faragher*, 524 U.S. at 807.

As the Third Circuit stated, "a plaintiff claiming constructive discharge must demonstrate that the alleged discrimination surpasses a threshold of intolerable conditions," and "intolerability is assessed by the objective standard of whether a reasonable person in the employee's position would have felt *compelled* to resign,—that is, whether he would have had no choice but to resign." Pet. App. 23a (quotation marks, brackets, ellipses and citation omitted; emphasis in original). Thus, in determining whether a constructive discharge has occurred "it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning." *Id.* at 25a.

Where an employee claims that supervisor sexual harassment itself compelled her resignation, "it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs." Pet. App. 58a. And, "[w]here a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 78 (1986) (Marshall, J., concurring).

In short, the constructive discharge law itself "encourag[es] forethought by employers and saving action by objecting employees" with respect to sexual harassment that results in a hostile workplace. *Ellerth*, 524 U.S. at 764-765; *Faragher*, 524 U.S. at 807.

CONCLUSION

The decision of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; AARP; THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION; THE LEGAL AID SOCIETY — EMPLOYMENT LAW CENTER; THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; THE NATIONAL WOMEN'S LAW CENTER; AND NOW LEGAL DEFENSE AND EDUCATION FUND; AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a constructive discharge that is caused by a supervisor's sexual harassment is a tangible employment action?

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Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986).....14
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Dunegan v. City of Council Grove, Kan. Water Dep't, 77 F. Supp. 2d 1192 (D. Kan. 1999).....12
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Lintz v. Am. Gen. Fin., Inc.,
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Price v. Delaware Dep't of Corrections,
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Scott v. Ameritex Yarn, 72 F. Supp. 2d 587 (D.S.C. 1999)..12
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Watson v. Nationwide Ins. Co.,
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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; AARP; THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION; THE LEGAL AID SOCIETY — EMPLOYMENT LAW CENTER; THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; THE NATIONAL WOMEN'S LAW CENTER; AND NOW LEGAL DEFENSE AND EDUCATION FUND; AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,[1] in support of Respondent's argument that the Third Circuit properly held that a constructive

[1] Petitioner and Respondent filed a joint consent to the filing of *amici* briefs with the Clerk of this Court. Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

discharge is a tangible employment action. *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003).

This case, involving the question of whether a constructive discharge caused by a supervisor's discrimination is a tangible employment action, is a matter of significant concern to the Lawyers' Committee for Civil Rights Under Law and the organizations joining this *amici* brief. This case could determine whether the long-established doctrine of constructive discharge will effectively protect victims of harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[2] The Court's decision here will directly affect the rights of employees who are forced out of employment on the basis of race, sex, religion, national origin, or ethnicity. As such, this case directly impacts the constituencies served by the undersigned organizations.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently

[2] Some *amici* also serve constituencies that will be affected by the Court's decision because Title VII is the model for other employment discrimination statutes. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 584 ("the prohibitions of the [Age Discrimination in Employment Act] were derived in *haec verba* from Title VII"); *see also, e.g., Acrey v. American Sheep Indus. Ass'n*, 981 F.2d 1569, 1574-75 (10th Cir. 1992) (affirming constructive discharge verdict for plaintiff under ADEA, and applying same legal analysis to Title VII and ADEA constructive discharge claims).

includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination. The Lawyers' Committee has handled cases involving both racial and sexual harassment, including filing an *amicus* brief in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Pursuant to a continuing interest in the appropriate scope of Title VII, and most recently, the Lawyers' Committee filed briefs in *Desert Palace v. Costa*, 539 U.S. 90 (2003); *Swierkiewicz v. Sorema*, 534 U.S. 506 (2001); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 1 (2001); and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

AARP is a nonpartisan, nonprofit membership organization serving over thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. Almost half of AARP members are employed, and all of these have a strong interest in the outcome of this case, which will affect their rights under the Age Discrimination in Employment Act (ADEA), due to similarities in judicial interpretation of comparable provisions of the ADEA and Title VII. In addition, more than half of AARP's working members are women, and a disproportionate share of them (and of AARP members of color, including African-American and Hispanic members) work full- or part-time. Thus, AARP members have a strong interest in vigorous enforcement of Title VII with regard to sexual (and racial) harassment. Finally, many AARP

members have disabilities, and rely on federal laws including the Americans with Disabilities Act – whose employment discrimination provisions also are based on Title VII – to create workplaces free from discriminatory harassment.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, non-partisan organization of more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Women's Rights Project ("WRP"), founded in 1972 by Ruth Bader Ginsburg, has been a leader in the efforts to eliminate barriers to women's full equality in American society. As part of that work, the ACLU WRP has dedicated its efforts to ensuring women's equal treatment in the workplace through the vigorous enforcement of the protections of Title VII. The ACLU has appeared before the Court in numerous cases involving the proper interpretation of civil rights laws and has fought to ensure that all individuals, regardless of race, gender, or other protected characteristics, have equal opportunities in the workplace. The ACLU has participated as *amicus* before the Court in several cases interpreting Title VII of the Civil Rights Act, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). More recent Title VII cases in which the ACLU has appeared as *amicus* include *Desert Palace v. Costa*, 539 U.S. 90 (2003); *Pollard v. E.I. Dupont Nemours Co.*, 532 U.S. 843 (2001); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

The Legal Aid Society – Employment Law Center ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to

communities of color, women, recent immigrants, individuals with disabilities, and the working poor, and specializes in, among other areas of the law, sex discrimination and sexual harassment.

The LAS-ELC has appeared before this Court on numerous occasions both as counsel for plaintiffs, *see National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g., U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The LAS-ELC's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California have over 50 years of experience in providing legal, public

policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing commitment in addressing matters of discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The National Employment Lawyers Association ("NELA") is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys, and NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the proper interpretation and application of Title VII in order to guarantee that the rights of workers are fully protected. For example, NELA filed *amicus curiae* briefs with this Court in *Desert Palace v. Costa*, 539 U.S. 90 (2003); *Edelman v. Lynchburg College*, 535 U.S. 106 (2002); and *West v. Gibson*, 527 U.S. 212 (1999).

NELA members represent thousands of individuals in this country who are victims of unlawful sex discrimination, including sexual harassment. The interest of NELA in this case is to protect the rights of its members' clients, by ensuring that the goals of Title VII of the Civil Rights Act of 1964, as amended, to eradicate employment discrimination are fully realized.

The National Partnership for Women & Families ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in

1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended. NWLC has prepared or participated in several *amicus* briefs in Title VII cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

NOW Legal Defense and Education Fund is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. A major goal of NOW Legal Defense and Education Fund is the elimination of barriers that deny women economic opportunity, such as sexual harassment. NOW Legal Defense and Education Fund has litigated cases to secure full enforcement of laws prohibiting sexual harassment, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), and has filed briefs in this Court as amicus curiae on leading sexual harassment cases, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). NOW Legal Defense and Education Fund believes that employers must be liable when

supervisors engage in discriminatory harassment that results in constructive discharge. Accordingly, NOW Legal Defense and Education Fund strongly supports affirming the decision of the Third Circuit below.

SUMMARY OF ARGUMENT

This is a constructive discharge case. Nancy Suders did not choose to leave her job. She was forced to resign because a combination of workplace conditions gave her no other choice.[3] Such forced resignation is the hallmark of constructive discharge. This Court and all of the federal circuit courts of appeals have recognized constructive discharge claims, holding employers liable for wrongful discharge when intolerable work conditions force an employee to resign.[4] In Suders' case, harassment by her direct supervisors[5] laid the groundwork for conditions that ultimately became so unbearable that she resigned to escape them. Other factors that placed her in this impossible situation included the ineffectiveness of procedures that should have remedied the harassment, along with events and conditions that contributed to Suders' reasonable belief that further efforts to resolve the matter internally would be futile.

In *Faragher v. City of Boca Raton*, 524 U.S. 775

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[3] All reasonable inferences must be drawn in favor of Suders, the party opposing the motion for summary judgment. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 747 (1998), *citing United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). At this stage in the proceedings, Suders' testimony that she had no choice in this matter must be taken as true. Ultimately, this question would be put to the fact-finder.

[4] *See infra* argument I.

[5] Because the Court granted certiorari on the question of a constructive discharge caused by *supervisors'* actions, rather than *coworkers'* actions, and because the facts of this case involve supervisor harassment, this brief does not address the issue of a constructive discharge caused by coworker harassment.

(1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court crafted a methodology for deciding harassment cases. That methodology distinguishes between (1) hostile work environment cases with no tangible employment action, in which defendants may invoke an affirmative defense, and (2) tangible employment action cases, in which no defense is available. Under *Faragher/Ellerth*, employers are strictly liable if a supervisor's harassment of a subordinate culminates in a tangible employment action. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. The Court described "tangible employment action" as a "significant change in employment status" and provided a non-exhaustive list of examples, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Faragher*, 524 U.S. at 790, 808; *Ellerth*, 524 U.S. at 761-62.

Because courts have for decades recognized that a constructive discharge—when proven—is the legal equivalent of an actual discharge, and because *Faragher/Ellerth* defined "tangible employment actions" to include discharges, constructive discharges necessarily constitute tangible employment actions. As a tangible employment action, constructive discharge precludes invoking the affirmative defense that *Faragher/Ellerth* made available in hostile environment cases. This conclusion is required by the *Faragher/Ellerth* description of tangible employment action as "a significant change in employment status," with all that change entails. The conclusion is rendered inescapable by the reality that proof of the facts underlying a successful constructive discharge claim, as a practical matter, disproves the facts that would necessarily underlie the affirmative defense.

The State Police and its *amici* ignore the doctrine of constructive discharge that is at the core of this case. In their

view, the fact that Suders was forced to leave her job because of her supervisors' actions should not even factor into the liability equation. Describing what happened to Suders as "mere" hostile work environment harassment, Petitioner asks the Court to absolve the employer of responsibility for "[t]he fact that an employee feels compelled to quit his or her job in response to intolerable sexual harassment." Brief for Petitioner at 12. From this truncated analysis of the facts, Petitioner then argues that it should be permitted to invoke the *Faragher/Ellerth* affirmative defense. Petitioner's disaggregation of the facts directly contravenes the Court's mandate to consider the totality of circumstances in harassment cases. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986).

ARGUMENT

I. When Proven, a Constructive Discharge is the Legal Equivalent of an Actual Discharge, Which *Faragher/Ellerth* Defined as a Tangible Employment Action.

For decades, courts have recognized that a constructive discharge—when proven—is the legal equivalent of an actual discharge. The *Faragher/Ellerth* Court expressly cited actual discharge as an example of a tangible employment action.[6] Because discharges fall squarely within the tangible employment action category, and because constructive discharge operates as the legal equivalent of actual discharge, constructive discharge necessarily constitutes a tangible employment action.[7] In

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[6] The Court provided a non-exhaustive list of examples of tangible employment actions, which included "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Faragher*, 524 U.S. at 790; *Ellerth*, 524 U.S. at 761.

[7] *See Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003); *Jaros v. LodgeNet Entm't Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) (constructive discharge constitutes a tangible employment action); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 144 (3d Cir. 1999). The First and Seventh Circuits have held that a constructive discharge caused by a supervisor's "official act" is a tangible employment action. *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003) (constructive discharge is a tangible employment action if it is caused by a supervisor's "official" act); *accord Robinson v. Sappington*, 351 F.3d 317, 336 (7th Cir. 2003). A significant number of federal district courts have ruled that constructive discharge is a tangible employment action. *Vasquez v. Atrium Door & Window Co. of Ariz., Inc.*, 218 F. Supp. 2d 1139, 1142 (D. Ariz. 2002); *Rousselle v. GTE Directories Corp.*, 85 F. Supp. 2d 1286, 1292 (M.D. Fla. 2000); *Bevilacqua v. Cubby Bear, Ltd.*, No. 98 C 7568, 2000 WL 152135, at *22 (N.D. Ill. Feb. 4, 2000); *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160 (N.D. Iowa 2000); *Watson v. Lucent Techs.*, 92 F. Supp. 2d 1129, 1135 (D. Kan. 2000); *Price v. Delaware Dep't of Corrections*, 40 F. Supp. 2d 544, 553 (D. Del. 1999); *Lintz v. Am. Gen. Fin., Inc.*, 50 F. Supp. 2d 1074, 1084 (D. Kan. 1999); *Galloway v. Matagorda County, Tex.*, 35 F.

litigation, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing Title VII, has also taken the position that a constructive discharge is a tangible employment action.[8] EEOC interpretive guidance issued after *Faragher/Ellerth* provides:

> Liability standards under the anti-discrimination statutes . . . generally make employers responsible for the discriminatory acts of their supervisors. If for example, a supervisor rejects a candidate for promotion because of national origin-based bias, the employer will be liable regardless of

Supp. 2d 952, 957 (S.D. Tex. 1999); *Leslie v. United Tech. Corp.*, 51 F. Supp. 2d 1332, 1345-46 (S.D. Fla. 1998); *Miller v. D.F. Zee's, Inc.*, 31 F. Supp. 2d 792, 803-04 (D. Or. 1998); *Delazaro v. Lehigh Univ.*, No. 98-CV432, 1999 U.S. Dist. LEXIS 1214, at *479 (E.D. Pa. Jan. 29, 1999); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1383 (S.D. Ga. 1998). The Second and Eleventh Circuits have held that constructive discharge is not a tangible employment action, and therefore, employers may assert the *Ellerth/Faragher* affirmative defense. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999) *accord Reynolds v. Golden Corral Corp.*, 106 F. Supp. 2d 1243, 1249 (M.D. Ala. 1999), *aff'd* 213 F.3d 1344 (11th Cir. 2000) (*per curiam*); *see also Desmarteau v. City of Wichita, Kan.*, 64 F. Supp. 2d 1067, 1078 (D. Kan. 1999); *Dunegan v. City of Council Grove, Kan. Water Dep't*, 77 F. Supp. 2d 1192, 1200 (D. Kan. 1999); *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587, 594 (D.S.C. 1999); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1019 (S.D. Ohio 1999).

[8] *See* Brief for EEOC at 3, *EEOC v. Crowder Construction Co.*, No. 3:00CV186-V, 2001 WL 1750843 (W.D.N.C. Oct. 26, 2001) ("[C]onstructive discharge constitutes a tangible job action because it results in a 'significant' change in employment status."); *accord* Amended Memorandum in Support of EEOC's Opposition to Motion for Summary Judgment at 15-19, *EEOC v. Barton Protective Services, Inc.*, 47 F. Supp. 2d 57 (D.D.C. 1999) (No. 98-1536/JR) ("Defendant, while recognizing EEOC's allegation that '[the plaintiff] was constructively discharged' . . . obtusely maintains that she did not suffer a 'tangible employment action' . . . . Not surprisingly, courts have recognized that constructive discharge can be a tangible employment action.").

> whether the employee complained to higher management and regardless of whether higher management had any knowledge about the supervisor's motivation. Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability and that limitation must be construed narrowly.

EEOC Enforcement Guidance: Vicarious Employer Responsibility for Unlawful Harassment by Supervisors, Part (V)(B) (June 18, 1999). Indeed, an employer should not be able to avoid liability where an employee has no reasonable option but to resign.

Courts and federal enforcement agencies have consistently treated constructive discharge as actual discharge. In fact, the doctrine developed precisely for the purpose of holding employers responsible for unlawful conditions that force employees to resign. The Supreme Court first held that a constructive discharge functions as the legal equivalent of an actual discharge in the case of *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984).[9] In that National Labor Relations Act case, the Court expressly recognized the equivalence between directly dismissing an employee and creating "working conditions so intolerable that the employee has no option but to resign -- a so-called 'constructive discharge:'" *Id.* The Court's *Sure-Tan* decision continued a tradition under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, of recognizing constructive discharge as the legal equivalent of actual discharge. *See The*

[9] *See also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 68, 76 (1990) (First Amendment patronage case recognizing that constructive discharge is the "substantial equivalent of a dismissal," explaining that "an employment decision is equivalent to a dismissal when it is one that would lead a reasonable person to resign").

Coachman's Inn, 147 NLRB 278, 303 (1964) (" '[R]esignation,' under pressure and scare . . . [must be] treated for legal purposes the same as an actual discharge. . . ."); *In Matter of Sterling Corset Co.*, 9 N.L.R.B. 858 (1938) (first use of the term "constructive discharge").

Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.*, which was modeled on the NLRA, adopted the doctrine of constructive discharge in whole cloth. *See, e.g.*, 110 CONG. REC. 3086, 7210-11, 8453 (1964) (Title VII was patterned after labor laws including NLRA); *English v. Powell* 592 F.2d 727, 731 n.4 (4th Cir. 1979) (holding "doctrine of constructive discharge 'had its genesis in the labor relations area but has been extended and held applicable to civil rights claims' "). Today, constructive discharge is universally recognized to provide redress to employees who are forced out of employment through discriminatory means.[10] Consistent with this universally accepted principle, the EEOC explains that an employer "is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party." EEOC Interpretive Manual, § 612.9(a).[11]

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[10] *Fitz v. Pugmire Lincoln-Mercury, Inc.*, 348 F.3d 974, 977 (11th Cir. 2003); *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 635 (6th Cir. 2003); *EEOC v. Univ. of Chicago Hosps*, 276 F.3d 326, 331 (7th Cir. 2002); *Fitzgerald v. Henderson*, 251 F.3d 345, 357-58 (2d Cir. 2001); *Jordan v. Clark*, 847 F.2d 1368, 1377 n.10 (9th Cir. 1988); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir. 1996); *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476 (1st Cir. 1993); *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992); *Paroline v. Unisys Corp.*, 900 F.2d 27 (4th Cir. 1990); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360 (9th Cir. 1987); *Derr v. Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981); *see also* A. Larson & L. Larson, EMPLOYMENT DISCRIMINATION, § 87.20 at 17-102 to 17-105 (1987).

[11] Indeed, contrary to the heavily conditioned position articulated in the Solicitor General's brief, to which the EEOC is a signatory, the EEOC has taken the straightforward position in its litigation that a constructive discharge is necessarily a tangible employment action and categorized the arguments to the contrary as "obtuse." *See supra* note 8.

Appropriately, in *Suders*, the Third Circuit recognized that a constructive discharge is the equivalent of an actual discharge:

> [It is a] fundamental principle of our jurisprudence that a constructive discharge, when proved, operates as the functional equivalent of an actual termination. This principle recognizes that when a plaintiff-employee successfully demonstrates that the work environment created by an employer was so intolerable that he or she had no choice but to resign, the constructive discharge becomes, for all intents and purposes, the act of the employer.

Suders, 325 F.3d at 458 (*citations omitted*).[12]

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[12] *See also, e.g., Fitz v. Pugmire Lincoln-Mercury, Inc.*, 348 F.3d 974, 977 (11th Cir. 2003) ("[C]onstructive discharge occurs when a discriminatory employer imposes working conditions that are 'so intolerable that a reasonable person in [the employee's] position would have been compelled to resign.' "); *Manatt v. Bank of Am., NA*, 339 F.3d 792, 803 (9th Cir. 2003) (constructive discharge requires "conditions so intolerable that a reasonable person would leave the job"); *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 635 (6th Cir. 2003) (employer must create intolerable working conditions that would force a reasonable person to resign); *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000) (finding constructive discharge where "the working conditions imposed by the employer had become so onerous, abusive, or unpleasant that a reasonable person in the employee's position would have felt compelled to resign"); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149 (2d Cir. 1998) (working conditions must be so intolerable that employee is forced into involuntary resignation); *Brown v. Ameritech Corp.*, 128 F.3d 605 (7th Cir. 1997) (rejecting claim of constructive discharge on the grounds that employee could have remained and the supervisor's comment was insufficiently forceful or coercive); *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992) (finding constructive discharge where the

In contrast to a constructive discharge claim, a hostile work environment claim does not require proof of conditions that would force a reasonable person to *resign*. Instead, a claim of environmental harassment requires proof of discriminatory behavior that is sufficiently severe or pervasive to alter the conditions of a victim's employment and to create an abusive working environment. *Meritor Savings Bank*, 477 U.S. at 64, 67. The Supreme Court has clarified that the hostile work environment "standard takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury . . . . Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). The doctrine of constructive discharge applies in the most egregious cases in which the employee is forced to resign because the work environment has become patently intolerable, and a reasonable person would conclude that he or she has no real option but to resign.[13]

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plaintiff demonstrates "a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment"); *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1132 (4th Cir. 1995) (constructive discharge requires proof that employer deliberately made working conditions intolerable in an effort to induce the employee to quit); *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995) ("An employee is constructively discharged when an employer deliberately renders the employee's working conditions intolerable and thus forces [her] to quit [her] job."); *Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981) (employee must establish that the employer "deliberately made . . . working conditions intelorable and drove [the employee] into an 'involuntary quit.' "; *Cartwright Hardware Co., Inc. v. NLRB*, 600 F.2d 268 (10th Cir. 1979) (rejecting claim of constructive discharge because record did not establish that the employees resigned because employer had created "impossible" conditions).

[13] This in no way suggests that the degree of harassment is the defining factor in a constructive discharge case. The standard for constructive discharge is that the employee is forced to resign because the work environment has become so intolerable, and a reasonable person would conclude that they have no real option but to resign. *See supra* note 12.

If Suders prevails on her claim of constructive discharge, that discharge constitutes a tangible employment action for which the *Faragher/Ellerth* affirmative defense is unavailable. Although Suders has not yet had the opportunity to present her claim of constructive discharge to a fact-finder, the Third Circuit suggests that her employment situation had reached a breaking point. *Suders*, 325 F.3d at 438 ("Suders reached a breaking point . . . . Any prospect of reconciliation was now lost."). At this point in the proceedings, we must take as true Suders' allegations that the hostile environment, combined with the lack of recourse, forced her resignation. If these facts are accepted by the fact-finder, Suders will prevail on her claim of constructive discharge.

If a fact-finder concludes that a constructive discharge occurred, this case cannot be characterized as Petitioner suggests—as a "mere" hostile work environment to which Suders responded by choosing to quit. Brief for Petitioner at 12. In a constructive discharge case, the employee does not "choose" to resign. Instead, workplace conditions leave the employee with no option but to leave. By definition, such a constructive discharge is the act of the employer, not of the terminated worker. Because a constructive discharge is the legal equivalent of an actual discharge, a constructive discharge constitutes a tangible employment action.

II. When Proven, Constructive Discharge Addresses the Core Policy Considerations Underlying the *Faragher/Ellerth* Defense, and Permitting the Defense in a Constructive Discharge Situation Makes No Sense.

The Supreme Court's purpose in allowing the *Faragher/Ellerth* defense is accomplished at the outset if the

plaintiff proves the elements of a constructive discharge. If employment circumstances are so onerous, abusive, or unpleasant that a reasonable person in the employee's position is compelled to resign,[14] then it will be impossible for the employer to prove that the employee acted *unreasonably* under the *Faragher/Ellerth* defense. Proof of a constructive discharge and proof of the *Faragher/Ellerth* defense are mutually exclusive and cannot be established on the same factual base.

The *Faragher/Ellerth* defense allows an employer to avoid liability when the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and the plaintiff-employee *unreasonably* failed to take advantage of any preventative or corrective opportunities provided by the employer. *Faragher,* 524 U.S. at 807. Before a jury would reach the question of whether the employee acted unreasonably under the affirmative defense, however, the jury would have first had to find a constructive discharge—i.e., that working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *See supra* note 12. These two findings cannot exist in tandem. The employer cannot prove the second prong of the affirmative defense—that the employee acted unreasonably—if the plaintiff proves at the outset that she acted reasonably pursuant to her constructive discharge claim.

A plaintiff alleging a constructive discharge in violation of Title VII must establish that he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign, given the totality of the circumstances. *See supra* note 12. In every jurisdiction, a claim of constructive

[14] *See supra* note 12.

discharge requires proof that the employee reasonably believed that she had no recourse but to resign. *Id.* As the Third Circuit observed in this case, "it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, [but] *a failure to do so will not defeat a claim of constructive discharge* where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign."[15] *Suders*, 325 F.3d at 445-46 (emphasis added). In sum, if there is an avenue short of resignation *reasonably* available to the employee to remedy the situation, and she fails to pursue that avenue, her failure will defeat the constructive discharge claim.

Petitioner and the Solicitor General have acknowledged the overlap between elements of constructive discharge and of the *Faragher/Ellerth* defense. Brief for Petitioner at 11; Brief for Solicitor General at 17-18. The Solicitor General admits that "[i]f an employer makes the showing necessary to establish the *Ellerth/Faragher* affirmative defense, it is difficult to understand how an employee would be able to establish a constructive discharge in the first place." Brief for Solicitor General at 17-18. Although the briefs of the Petitioner and its *amici* admit this overlap, they fail to address its ramifications. The Solicitor General's brief suggests that the instant "case does not raise the question of the precise relationship between the standard for proving a constructive discharge and the

[15] The Chamber of Commerce argues that harassment victims will deliberately deprive employers of information about harassment so that victims can bring constructive discharge cases and cut off any affirmative defenses by quitting rather than notifying the employer, who could then correct the harassment. This argument ignores the fact that the plaintiff who manipulates the system in this way would not be able to meet the "reasonableness" test required to prove a constructive discharge. It also ignores the facts that resigning from a job is not easy for an employee who is dependent on a salary, and that bringing a harassment case is a stressful, expensive undertaking.

Ellerth/Faragher affirmative defense."[16] *Id.* On the contrary, this case raises precisely that issue. This case cannot be decided without accounting for the mutual exclusivity of the doctrines of constructive discharge and the *Faragher/Ellerth* affirmative defense. The Court should address this concern and provide a coherent doctrine to guide the lower courts, recognizing that a constructive discharge occurs when intolerable employment circumstances leave an employee with no option but to resign. When a constructive discharge occurs, the affirmative defense has no application.

III. Constructive Discharge Exhibits the Attributes of a Tangible Employment Action

In *Faragher/Ellerth*, the Court noted attributes typical of tangible employment actions. Generally, the Court explained that a tangible employment action may fundamentally change the worker's status at the firm, impose direct financial harm, and constitute an official company act.[17] Under the Court's reasoning, these attributes verify that the action is aided by the agency relationship.[18] The

[16] By its own admission, the Solicitor General's proposed analysis could only apply to a narrow set of circumstances where the evidence supporting the constructive discharge does not overlap with the affirmative defense. Brief for Solicitor General at 17-18.

[17] These are examples of the attributes of a tangible employment action, rather than an exclusive or mandatory list. The totality of facts must be examined in each harassment case. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986); *see also Holly D. v. Ca. Inst. of Tech.*, 339 F.3d 1158 (9th Cir. 2003) (submission to sexual abuse by a supervisor constitutes a tangible employment action); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84 (2d Cir. 2002) (same).

[18] In *Faragher*, the Court recognized:

> [T]here is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship . . . . When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a coworker.

Faragher, 524 U.S. at 802-03. Accordingly, an employer can be liable for the actions of a supervisor, even when the supervisor acts outside of expressly and affirmatively delegated authority. *Faragher* at 805; *see also* Susan Grover, *After* Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 839 (2002) ("The key, then, is . . . the source of the power the supervisor uses to take that action. If that power is derived from the authority the supervisor derives from his relationship with the employer, the action taken is a [tangible employment action], regardless of whether it alters the subordinate's status in an ultimate sense.").

Court discussed these attributes in general terms and used qualifying language:

> A tangible employment action *in most cases* inflicts direct economic harm. *As a general proposition*, only a supervisor, or other person acting with the authority of the company can cause this sort of injury. . . . A tangible employment decision . . . *in most cases* is documented in official company records . . . .

Ellerth, 524 U.S. at 761-62 (emphasis added). Clearly the Court intended to provide a flexible framework of general guidance. The Court did not suggest that each of these attributes would apply to every tangible employment action. Nevertheless, a constructive discharge possesses each of the attributes characteristic of the tangible employment action, as described in *Faragher/Ellerth*.

Ellerth characterized a "tangible employment action" as "a significant change in employment status . . . ." *Ellerth*, 524 U.S. at 761. In its effect on the worker's employment status, a constructive discharge is unassailably a discharge with identical changes in employment status. "[C]onstructive

discharge constitutes precisely the same sort of 'significant change in employment status' and inflicts precisely the same sort of 'economic harm' as any other 'firing.' " *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1173 (N.D. Iowa 2000); *see also Vasquez v. Atrium Door & Window Co. of Ariz., Inc.*, 218 F. Supp. 2d 1139, 1142-43 (D. Ariz. 2002).

Petitioner actually agrees that constructive discharge "effects a significant change in employment status," but would discount that change by claiming that the change is "a result of the employee's own decision." Brief for Petitioner at 21. This argument has two shortcomings. For one, the change in employment status results regardless of whether the discharge is actual or constructive. The "significant change in employment status" criterion of *Faragher/Ellerth* assesses the results of the act, not the causative act itself. More importantly, Petitioner's characterization of the underlying act is inaccurate; the causative act is not that of the employee, but of the employer, through the actions of its supervisors combined with the unavailability of internal remedies to rectify the situation. By definition, constructive discharge does not involve a *true choice* on the part of the employee. When a constructive discharge occurs, the responsible actor is the employer, not the employee. The discharge is forced on the employee by the employer's actions—the employee has no choice but to resign. As a matter of law, a constructive discharge is identical to an actual discharge in its effect on the employee's employment status.

The Court also provided that a "tangible employment action in most cases inflicts direct economic harm." *Ellerth*, 524 U.S. at 762. Like any other type of discharge, constructive discharge falls squarely within the category of employment actions that cause economic harm. As the Third Circuit recognized in this case, "when a plaintiff-employee meets the stringent test of showing a constructive discharge,

the direct economic harm suffered is identical to that of a formally discharged employee." *Suders*, 325 F.3d at 458. Because direct economic harm results regardless of whether the discharge is actual or constructive, *Ellerth*'s definition renders constructive discharge a tangible employment action.

The Court also advised that a tangible employment action in most cases involves an "official company act." *Ellerth*, 524 U.S. at 762. Where intolerable work conditions force an employee to resign, that constructive discharge is treated as an act of the employer, just as an actual discharge would be. The official nature of the discharge is reinforced by the employer's receipt, acceptance, processing and recording of the employee's letter or other notice of resignation. As found by the court below, "when a supervisor creates a hostile work environment so severe that an employee has no alternative but to resign, the official power of the enterprise is brought to bear on the constructive discharge." *Suders*, 325 F.3d at 459. The official action is allowing the workplace to become so hostile and so unresponsive to the employee's injuries that the harassed employee reasonably believes that immediate resignation is her only choice. For decades, the law has recognized that a constructive discharge is an official company act for which the employer must be liable. *See supra* argument I. Under the doctrine of constructive discharge, the official act is the creation of workplace conditions so intolerable that the harassed employee has no choice but to resign.

Because a constructive discharge constitutes an official act in and of itself, the Court must reject the Solicitor General's argument that a constructive discharge constitutes a tangible employment action only if it is effected through an intermediate "official act." Brief for Solicitor General at 8. Moreover, the distinction between official and unofficial acts suggested by the Solicitor General ignores the reality of the workplace. The Court has recognized that "a supervisor's

power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ellerth*, 524 U.S. at 763. Where, as here, a supervisor's actions culminate in a discharge, the Court recognized in *Ellerth* that those actions are aided by the agency relation. *Ellerth*, 524 U.S. at 761.

Additionally, the Court explained that an official company act "in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Ellerth*, 524 U.S. at 762. Indeed, a constructive discharge involves a forced resignation that will be documented in company records and subject to review by higher level supervisors. The company must take official actions to ensure that the person is no longer on the payroll. The Third Circuit recognized that "a constructive discharge will necessarily involve the termination of an employment relationship, [therefore] the employer will be on notice and have the opportunity to determine the cause of separation from employment." *Suders*, 325 F.3d at 460. The added element of a forced resignation distinguishes constructive discharge from a hostile environment, where there is no official company act.

In summary, *Faragher/Ellerth* created an exception to the general rule of employer liability. This exception applies only to claims of hostile work environment. The exception does not apply to tangible employment actions, such as the constructive discharge that occurred in this case.

CONCLUSION

For the above reasons, the *amici* respectfully suggest

that the Third Circuit's holding that constructive discharge constitutes a tangible employment action, and therefore, the *Faragher/Ellerth* affirmative defense does not apply, should be

AFFIRMED.

Respectfully submitted,

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